No. 82-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

YVONNE G. TROUT,

Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I.

What shall be the controlling model of proof for a named plaintiff in a multi-plaintiff class action Title VII disparate treatment case with reduced opportunity to present single-plaintiff evidence?

II.

Whether "abrasiveness" under the circumstances of lengthy Title VII litigation is a legitimate non-discriminatory rebuttal of itself without comparative evidence to which the employer has best access?

LIST OF ALL PARTIES

The following parties appeared below:

Yvonne G. Trout

Defendants Secretary of the Navy in their official capacity were successively John W. Warner, J. William Middendorf, William Graham Claytor, Edward Hidalgo, and the current Secretary of the Navy, John F. Lehman, Jr.

Defendant Commanding Officers, Naval Command Systems Support Activity (NAVCOSSACT), were successively Captains Warren Taylor, Peter S. Swanson, W. J. Clermont, E. W. V. Webster, Paul E. Sutherland, Jr., and Paul Pfeiffer. The current Commanding Officer is James C. Richardson, Jr. (NAVCOSSACT was renamed Navy Regional Data Automation Center, Washington, D.C. (NARDAC WASHINGTON DC) in 1977.)

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The petitioner, Yvonne G. Trout, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, i.e. the panel decision dated October 7, 1982, and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc, dated December 2, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 517 F.Supp. 873

(1981), and is set out in the appendix, *infra,* as Appendix F. By memorandum order dated October 20, 1981, which is unreported, the District Court, in footnote 8 removed petitioner from claims of the successful class, of which she was a representative. This order is set out in the appendix, *infra,* as Appendix E. The panel decision of the United States Court of Appeals for the District of Columbia Circuit to dismiss the class representative case for want of jurisdiction, certification under Federal Rule of Civil Procedure 54(b), dated January 21, 1982, appears in the appendix, *infra,* as Appendix D. The District Court issued a memorandum order dated March 10, 1982, and an amended judgment dated March 24, 1982, pursuant to Rule 54(b), Federal Rules of Civil Procedure, both of which appear in the appendix, *infra,* as Appendix C. The panel decision of the United States Court of Appeals for the District of Columbia, which is unreported, dated October 7, 1982, appears in the appendix, *infra,* as Appendix B. The Court denied petitioner's petition for rehearing and suggestion for rehearing *en banc* on December 2, 1982. Copies of these orders are attached as Appendix A.

JURISDICTION

On 7 October 1982 the Court of Appeals entered judgment affirming dismissal of the claims Yvonne G. Trout, (App. B), and on 2 December 1982, the Court denied petitioner's petition for rehearing and suggestion for rehearing *en banc.* (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).[1]

[1]No other petitioner is involved in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievance."

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment IX:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Civil Rights Act of 1964 as amended by Section 717 of the "Equal Employment Opportunity Act of 1972," 42 U.S.C. § 2000e *et seq.* is set out in Appendix G.

Presidential Memorandum of July 23, 1962, of John F. Kennedy and Executive Order 11478 of August 8, 1969, "Equal Employment Opportunity in the Federal Government" signed by Richard Nixon, as amended, are set out in Appendix H.

Extracts from the Federal Personnel Manual and the FPM Supplement are set out in Appendix I.

STATEMENT OF THE CASE

The petitioner, Yvonne G. Trout, was employed by the Naval Command Systems Support Activity (NAVCOSSACT) in March 1967 as a computer systems analyst GS-334-12. She was promoted to GS-13 in October 1967. During her first three years at NAVCOSSACT she was placed on details out of her parent department for not less than 27 months. She asked several times for an assignment in her career path. In June 1970 she was given leadership of a small project, and also was assigned as subsystem leader to do design planning of the Chief of Naval Operations Command/Management Information System (CNOCOM/MIS) module which was to furnish information to the Chief of Naval Operations himself and his personal staff. Her performance ratings were above satisfactory. She was enrolled at night in a program leading to a master's degree in work related to her assignment.

In September 1970, Ms. Trout was appointed EEO counselor, a duty which lasted but a single day since the first complaint she received involved pre-selection of a white male in her own department, and the beginning investigation angered her supervisors. She applied for a vacancy announcement to GS-14 in her own department in November 1970. In December 1970 she was notified she was being moved to another department. She protested the move to programmer duties as unfair and discriminatory on the basis that she believed her design for the CNOCOM/MIS module was a breakthrough in the state-of-the-art, that she was a project leader and a subsystem leader scheduled to be over three other projects, that she was an analyst and these duties would be those of programmer, that the work of the other department was a specialty in which she had no expertise, that she had applied for promotion and could not be promoted from the

other department, and that she believed her supervisor, Mr. William McShea, did not want a woman to make a breakthrough in the state-of-the-art. Ms. Trout finally accepted a 120-day detail on the condition that she could return to her parent department at its conclusion, as provided in the regulations.[2] On the following day she advised Mr. McShea through his secretary that she changed her mind and wanted to see him, that she did not want even the detail since her lack of expertise would not be enough help to the other department in view of her lack of experience in writing operating systems. She repeated the unfair bases stated previously. Ms. Trout was detailed effective January 4, 1971. NAVCOSSACT had a policy that an employee could only be promoted if given a recommendation by his/her current department head, and a policy that employees could be swapped among departments by mutual agreement of department heads. (These policies and other policies and unlawful practices were admitted by the Navy in stipulated facts contained in the Pretrial Order of Magistrate Arthur L. Burnett dated December 23, 1974.) Shortly after Ms. Trout's detail to the other department, a white male in her former department received the promotion for which she had applied.

After two months in the detail department, the department head, Mr. Daniel C. Foster, wanted to move Ms. Trout to a different long-term project than the one for which she was detailed. She agreed that the project was more in her line of expertise, but reminded him that she was to be returned to her previous department in two

[2] "A *detail* is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail. Technically, a position is not *filled* by a detail, as the employee continues to be the incumbent of the position from which detailed." Federal Personnel Manual, 300-19, Subchapter 8. Detail of Employees, 8-1 Definition, August 26, 1970.

months when her detail expired. Mr. Foster told Ms. Trout that she would either voluntarily extend her detail or voluntarily transfer to his department, or her would give her an unsatisfactory performance rating. Ms. Trout stated that if she was being threatened, she would seek an attorney. She obtained the services of a labor relations representative from her union, but Mr. Foster refused to meet with the union representative for a period in excess of thirty days, during which time he gave Ms. Trout a letter of caution for attitude and effected her involuntary transfer to his department. Ms. Trout was given low-level programming duties along with xeroxing and keypunching duties for the rest of 1971. After Mr. Foster finally met with the union representative, it became apparent that no changes were to be made. Although she had sought advice from numerous people, including her personnel officer, the only vehicle for formal complaint of which she had knowledge was a "grievance". She furnished a written grievance to Mr. Foster on April 30, 1971.[3] It was necessary for Ms. Trout to ask help from the Secretary of the Navy to get her grievance accepted for investigation. The in-house investigator, Mr. Charles Mehmel, GS-15, found she had been career-impacted and recommended she be returned to her previous department. The Commanding Officer, Captain Warren Taylor, would not accept this recommendation and requested a hearing examiner. A three-day hearing was held in September 1971

[3]Subsequent to the grievance, Ms. Trout's performance evaluations under Mr. Foster caused her to fall in the command-wide "secret" rankings from the upper quarter to the bottom of her peers. The evaluations of Trout under Foster were kept secret until 20 July 1973 when EEO investigator Charles Smith showed Trout for the first time her evaluations for three years in the office of her attorney. No provision was ever made to correct these. Compare *Stoller v. Marsh*, 682 F.2d 971, 976, 977 (DC Cir 1982) to stipulated statement of facts in Pretrial Proceedings of Magistrate Arthur L. Burnett dated December 23, 1974, pages 38-40.

at which Mr. Foster was the management representative. Mr. Foster arranged for the management side to proceed first, calling the witnesses named by Ms. Trout thus placing her in position of having to cross-examine the witnesses she had specified. Navy upheld management. Ms. Trout retained an attorney, and after additional administrative processing, on January 10, 1973, she instituted an employment discrimination suit against her employer, alleging a pattern or practice of discrimination against professional technical women employees with regard to promotions and other employment decisions. On April 5, 1973, the trial court allowed a second party plaintiff to join the action and also provisionally certified a Title VII class of all past, present, and future female professional technical employees of NAVCOSSACT. On July 2, 1974, a District Court magistrate directed counsel to prepare statements of undisputed facts and pretrial statements with witness lists. In December 1974, the magistrate completed pretrial proceedings. On June 10, 1975, an order staying proceeding pending determination of appeal in related cases was issued by the District Court. During all of this time, Ms. Trout remained assigned to Mr. Foster. When he changed departments in 1972, he took Ms. Trout's project with him. Mr. Foster was promoted to GS-16 subsequent to being management representative in Ms. Trout's hearing. Because of procedural irregularities found in the merit promotion procedures at NAVCOSSACT, Ms. Trout was promoted by the Navy in January 1974.

In October 1975, Ms. Trout was detailed to be program manager in another department. Four positions as program manager were advertised, which had not been the custom before in NAVCOSSACT. Ms. Trout applied for all four, was rated highly qualified in three of them and selected for the fourth in February 1976.

In February 1976 a third plaintiff and class member filed an individual action alleging discrimination and retaliation. Later that same year in June, the fourth and fifth plaintiffs, not members of the class, filed a joint complaint. In December 1976, the District Court denied defendants' motion to reconsider and reverse the class action order, and it consolidated all relevant claims.

In March 1977, NAVCOSSACT was merged with several smaller organizations, becoming the Navy Regional Data Automation Center Washington DC (NARDAC WASHINGTON DC). During most of 1977 Plaintiffs and Defendants were engaged in extensive settlement negotiations. At various times, prospects for settlement appeared quite favorable. Ms. Trout's department head at this time, Mr. Charles H. Bremer, also had duty as the Navy representative to the Department of Justice with respect to the discrimination suits. During the negotiation period, Defendants began to engage in conduct perceived by Trout and other parties to the settlement attempt to be retaliatory in nature. The characteristically discriminatory and harassing behavior continued, reflecting itself both in daily work details, and settlement negotiations, and Plaintiffs voted unanimously to terminate settlement discussions until this conduct improved. Settlement discussions were terminated by letter in November 1977, and the Navy withdrew all offers. The furtherance of discriminatory treatment gave rise to Trout's second complaint, CA 78-1098. On February 23, 1979, the trial court granted defendants' motion to consolidate this case with the others.

Ms. Trout's second case concerned the perceived reprisal for her Title VII activity in the erosion of her staff and responsibilities, finally coming full circle to a detail, followed by a transfer to lower level duties in a new

department. The three white males who had been selected for program manager were not similarly detailed. Harassment of Ms. Trout had intensified during the year of "good faith" negotiations which were attempting settlement of the class action and the individual claims. Ms. Trout's detail was effective November 1977. In her new assignment as staff assistant, Ms. Trout edited two requests for proposal for contract manpower, revising these several times, ordered publications, xeroxed, and tried to appear busy. Her office was a glass cubicle near the elevator in full view of all personnel entering the department. In 1978, ten GS-15 vacancies were advertised. After obtaining assistance from her department head in writing the description of her duties for these applications, Ms. Trout applied for all ten, but was not selected. NARDAC planned a transfer of function of Ms. Trout's assigned department to the Naval Electronics Systems Command effective October 1979. Since Ms. Trout had been there nearly two years on a "reassignment temporary," she was given the option of transferring in her current duties or of remaining with NARDAC. No other person being transferred was in a "reassignment - temporary." Ms. Trout elected to remain with NARDAC, and was assigned to a new department as a division head, a lower level in the hierarchy than program manager had been. One year later, effective October 1980, this department was transferred to the Navy Telecommunications Command. Ms. Trout was given no options, so both she and her coplaintiff in the class action were removed from NARDAC by transfer of function.

On May 4, 1980, the court ordered parties to file certain pleadings within 30 days. One week later the court ordered parties to reduce the witness list drastically. Trial was held in the District Court June 16 through June 27, 1980. The trial covered the five individual cases, the class action, and

the second reprisal action of Ms. Trout. After waiting seven years for trial, Ms. Trout lost most of her witnesses to the drastic reduction of the witness list. Although defendants could identify their exhibits, plaintiffs were specifically directed by the court several times not to identify exhibits.[4] The court laid the ground rules early,[5] objected to details,[6] objected to repetitive testimony,[7] and appeared to rush the trial.[8] Ms. Trout's counsel entered all of the deposition in evidence to fill the voids.[9] Ms. Trout was not given a "full and fair opportunity" to demonstrate pretext, and even efforts to anticipate this showing were cut off. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-805 (1973); *Texas Dept. of Community Affairs v. Burdine,* 101 S.Ct. 1089, 1095-1096 (1981).

By order filed April 16, 1981, the court certified the class, entered judgment for plaintiffs as to the class action, entered judgments for two of the individual plaintiffs, and dismissed claims of the three other individual plaintiffs including Trout. The District Court held specifically that the defendants, in this case the Department of the Navy, had not rebutted the plaintiffs' case evidence. In particular, the court noted that "because defendants have failed to produce evidence that would allow the Court to conclude that they did not unlawfully discriminate, the Court, applying the burden-of-production rule articulated by the Supreme Court in *Burdine,* finds that defendants have not rebutted

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[4]Trial transcript (Tr.) at 15, 90-92, 158-159, 1089, 1388.

[5]Tr. at 15, 23, 34, 129, 133, 150.

[6]Tr. at 247-248, 381-382 399-400, 404-405.

[7]Tr. at 158-159, 1064, 1069, 1182, 1185, 1227.

[8]Tr. at 204, 247, 334, 404-406, 520W, 731, 735, 744-745, 757, 759, 831-833, 837, 870, 1046, 1135.

[9]Tr. at 1237-1238, 1293.

plaintiffs' prima facie case of discrimination."[10] The District Court went on to state that defendants' evidence fell "far short" of rebutting plaintiffs' showing of entrenched discrimination.[11]

The District Court nevertheless dismissed the individual claims of Trout, the original plaintiff, rendering her ineligible for recovery on the grounds that she was too argumentative. The District Court concluded, as defendants had suggested, that because Ms. Trout was considered to have an abrasive and disputatious personality, she was therefore a poor manager for the Navy's program and that sex discrimination was not a factor in their employment decisions concerning her, despite her successful showing that the Navy had continually practiced discriminatory treatment toward women. By memorandum order dated October 20, 1981, in footnote 8, the District Court removed petitioner from claims of the successful class, of which she was a representative. (Appendix E.)

On Appeal the Circuit Court of Appeals for the District of Columbia upheld the District Court decision without opinion on October 7, 1982. Petition for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals on December 2, 1982.

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[10]Trout v. Hidalgo, 517 F.Supp. 873, 887 (DDC 981).

[11]*Id.* at 887.

REASONS FOR GRANTING THE WRIT

I. THE IMPLICIT HOLDING OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT WITH RESPECT TO THE INDIVIDUAL CLAIMS OF TROUT CONFLICTS WITH A LONG LINE OF CLASS ACTION AND INDIVIDUAL EMPLOYMENT DISCRIMINATION DECISIONS, BOTH FROM THIS COURT, AND FROM MANY OF THE CIRCUITS OF APPEALS

A. The Court of Appeals Erred in Affirming a Decision that Erroneously Confused the Standard of Proof Necessary to Rebut an Individual Inference of Discrimination as Articulated By *Burdine*, with the Evidentiary Standard of Proof Necessary to Exclude an Individual Class Member from Relief Once Classwide Discrimination Has Been Proven.

While recognizing the general procedural principle from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that the plaintiff must carry the initial burden to prove a prima facie case of discrimination, this Court has been quite particular to distinguish certain other important aspects of *McDonnell Douglas* that must be altered where a classwide showing of discrimination is at issue.[12] In a line of cases dating from 1976, this Court has established procedure for class action suits that differs from the original, single plaintiff suit of *McDonnell Douglas*. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1978).

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[12]This Court, however, has not yet heard and decided a disparate treatment class action suit. See discussion 31 AUL Rev. 755, 775 (1982).

For example, in a class action discrimination suit, class plaintiffs carry initially a much greater burden than an individual plaintiff. This stems from the fact that theirs is a much different case, attempting to prove that it was an employer's regular practice to discriminate as opposed to proving the existence of an isolated discriminatory event. This heavier burden has been met in these cases by the presentation of statistics showing discrimination against the class, as well as anecdotal evidence to bring "the cold numbers convincingly to life".[13] While class plaintiffs bear the more onerous burden of persuading the court that with regard to the employer, discrimination is the rule rather than the exception, if successful, it creates a strong rebuttable presumption in favor of any employee that any individual decision made by the employer was a component of the overall discriminatory pattern. Such a showing changes the position of the employer to that of "proved wrongdoer."[14] This Court in *Teamsters* then reasoned that because of these factors and the fact that under these circumstances the employer is in the best position to show why any individual employee was denied employment opportunity, the employer's burden to rebut in a class action setting was the burden to prove that there was no class discrimination by demonstrating the inaccuracy or the insignificance of plaintiffs' statistics and anecdotal evidence. If a defendant cannot meet this proof, classwide discrimination will be found. The existence of such classwide discrimination, however, does not automatically entitle each member of the class to relief. To be eligible for relief, this Court held, each member must show either that she officially sought job opportunity through application or if she did not make formal application, that she was a

[13] *Teamsters*, 431 U.S. at 338-39.

[14] *Id.* at 359-60.

potential victim of discrimination. *Teamsters* 367.[15] The burden then rests on the employer to prove that the individual was denied an opportunity for lawful reasons.

That an employer should have a much more difficult time rebutting a broad-based, statistical and anecdotal showing of class-wide discrimination, especially where that showing is strong, is fairly obvious. What has become increasingly unclear is the extent to which this Court's decision in *Burdine* pertains to defendant's rebuttal and individual relief stages of a disparate treatment class action suit.

In particular, several circuits have held that the *Burdine* ruling which holds that the burden of proof does not shift to the employer, and which articulates a more lenient "burden of production" for employers does not apply to class action suits. In *Taylor v. Teletype Corp.*, 648 F.2d 1129 (1981), the Eighth Circuit held that "once a plaintiff establishes a prima facie case of classwide discrimination, the burden shifts to the employer to prove that the individual employment decision was free from that discrimination." *Id.* at 1136. That court quoted *Teamsters'* and *Franks'* reasoning that a classwide showing creates a strong rebuttable presumption in favor of individual relief, changes the employer to a position of proved wrongdoer, and that the employer has the best access to evidence to rebut such a wide showing. In a footnote that court remarked that "the recent Supreme Court's decision

[15]Petitioner has a broader claim, however, reaching to assignments, training, authority to carry out assigned responsibilities, underemployment, downgrading with respect to duties and responsibilities, demeaning position, in summary, the "enduring effects" of entrenched discrimination. This claim stems from "All personnel actions affecting employees. . ." Section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1970 ed., Supp. IV).

clarifying the burdens of proof in an individual *'McDonnell Douglas'* case of discrimination does not affect the allocation of burdens in a case of classwide discrimination. . . A *McDonnell Douglas* prima facie showing requires no proof of wrongdoing, but merely 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors' . . . A case of classwide discrimination differs significantly . . . Thus, a court may reasonably presume — unless the employer proves otherwise — that any class member was a victim of that policy." 648 F.2d 1137 FN 18.

The Fifth Circuit in a class action suit from 1982, *Payne v. Travenol Laboratories, Inc.* 673 F.2d 798, 818, held explicitly that *"McDonnell Douglas* and *Burdine* establish the model of proof only for an individual disparate treatment case. In a class action we adhere to the pattern of proof set out in *Teamsters* and *Hazelwood.* Our cases have recognized the distinction between individual and class claims of disparate treatment. . . . Nothing in *Burdine,* a single-plaintiff case, suggests that the Court intended to supplant the procedures for proving classwide disparate treatment announced in *Teamsters* and *Hazelwood."* 673 F.2d 818.

In *McKenzie v. Sawyer,* 684 F.2d 62, the DC Circuit, the same Circuit which has upheld Trout, upheld a finding that an employer, once proven to be a classwide discriminator, could eliminate individual class members only by proving that a minority had been promoted or that a class individual was unqualified. There that court emphasized that "the situation of an individual class member seeking to share in a back pay award against an employer shown to have violated Title VII, however, is not analogous to the situation of an individual plaintiff who

has made out a prima facie case of disparate treatment." *Id.* at 77. The DC Circuit noted that "it remains debatable whether the *Burdine* holding that the burden of persuasion remains with an individual plaintiff should be applied to a class action suit alleging disparate treatment." *Id.* at 71 FN 7.

Other class action cases have followed the basic tenets of *Franks, Hazelwood,* and *Teamsters,* without addressing this inherent conflict.

It is important here to note, however, that Trout's case is not inexorably tied to a showing that Burdine is inapplicable to class action suits. In *Trout,* the District Court held defendants fell "far short" of rebutting the plaintiffs' strong classwide prima facie case, even under the supposedly more lenient rebuttal standards of *Burdine* which the District Court relied upon and cited.

Whatever the standard of proof that is required to eliminate an individual class plaintiff from the class is, be it the *Teamsters* burden to prove, or the *Burdine* burden to produce, it is not reasonable to conclude that Trout can be eliminated on the grounds that she was disputatious.

B.The Court of Appeals Decision Upholding the Dismissal of Trout's Individual Claims, Which Renders Her Ineligible for Recovery Benefits, Cannot Be Justified Under Either Judicial Standard.

Totally subjective, ad hominem reasons certainly would not suffice under *Franks - Teamsters - Hazelwood* standards as rebuttal to a prima facie case in which "the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer," and created "a greater likelihood that any single decision was a compo-

nent of the overall pattern." 431 U.S. 359-60 N 45. The Government's attack on the Hazelwood School District included "the standardless and largely subjective hiring procedures," which considered "such intangibles as 'personality, disposition, appearance, poise, voice, articulation, and ability to deal with people.' " *Hazelwood School District v. United States,* 433 U.S. 299, 302-303. Both in *Frank* and in *Albemarle,* this Court holds that denial of relief to victims of discrimination is permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975); 424 U.S. at 771.

Analogous to the discussion in *Teamsters* of the effects comparable to a sign reading "Whites Only",[16] the message "Men Only" for leadership positions was communicated to the women of NAVCOSSACT/NARDAC more subtly but just as clearly by the employer's actual practices of often unpublicized vacancies, of vacancy announcements for generic positions tailored to fit the preselected selectee, of a secret evaluation and ranking system, of job assignments, of selection for training, of frequent reorganizations, and of answering improperly or failing to answer casual, tentative and even specific inquiries. Calling attention to some of these practices "upset" the NAVCOSSACT management. Tr. at 743-744 One witness testified that she was warned by her supervisor in a nice way not to file a grievance or she would be treated like all these other women were treated that had already filed their grievances. Tr. at 583. As the Eight Circuit has noted, "antagonism between parties occurs as the

[16]431 U.S. at 365.

natural bi-product of any litigation." *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139. Can "disputatiousness" be justified as a legitimate nondiscriminatory reason for not a single decision, but many years of decisions with respect to Trout, by an employer who "has already been shown to have maintained a policy of discriminatory decisionmaking" in the successful class action? 431 U.S. at 362. Is it reasonable to believe the Navy made every decision with respect to Trout with the purity of Sir Galahad over all these years while at the same time practicing entrenched discrimination toward the rest of the class?

Subjective, ad hominem reasons do not suffice even under single-plaintiff standards, even though such standards overlook the strong class showing. Subjective reasons have long been seen as suspicious. In *McDonnell Douglas,* this Court noted the Eighth Circuit's observation that the refusal to hire Green "rested on 'subjective' criteria which carried little weight in rebutting charges of discrimination," then reviewed the deliberate unlawful "stall-in" against his former employer. This Court went on to say that Title VII does not permit the use of "respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1)," establishing the principle that the respondent must "be afforded a fair opportunity" to show that the employer's stated reason for the employee's rejection was in fact pretext. 411 U.S. at 798, 803-805. Trout was already employed by Navy and participated in no illegal activity against Navy. The Trout cases are not single incident cases, but cover nearly a ten year period.

Many Circuits have held that once a plaintiff's prima facie case has been rebutted, the plaintiff must be given a full and fair opportunity to show that the reason articulated by the employer is in fact a pretext for discrimination. Trout was not only not afforded any full

and fair opportunity to demonstrate pretext, but she was not afforded the opportunity to present her case fully in accordance with the strategy planned by her counsel under the conditions of "drastically reduced" witnesses. In order to fill the void, counsel submitted all the depositions in entirety into evidence (Tr. at 1237-1238) which the Court said it would read (Tr. 1293). As an example of inability to anticipate the required showings, at trial Trout attempted to show in her retaliation case that there was a strong attempt to create a record against her, but the Court objected to details and prevented admission of testimony. Tr. 381, 382, 406, 458, 500, 868-870, 1046. The Court objected to detail in testimony relating to Ms. Trout's downgrading (Tr. at 399-400, 404-405) and cut off a line of questions designed to show the causal connection to retaliation (Tr. 837), although it appears in deposition. (Deposition of Charles H. Bremer, December 5, 1978, pages 206-207, 227-230.) At the end of trial, the Court was concerned primarily with statistics and the statistical experts. With no new evidence, how could the Court find the defendants on one hand did not rebut the plaintiffs' prima facie case of discrimination, even under the more lenient burden-of-production rule articulated in *Burdine,*[17] and on the other hand that defendants rebutted the original plaintiff?

The District Court became confused, judging the case under *Burdine,* a single-plaintiff standard, when the trial was conducted under class plaintiff standards of reduced numbers of witnesses, reduced testimony, and economy of time. It is understandable that in a large class action it is necessary for the judge to set limits in order to conserve the time of the court, but for exactly that reason an individual plaintiff should not then be judged by individual

[17]Trout v. Hidalgo, 517 F.Supp. 873, 887.

standards without a full and fair opportunity to present an individual case. Where the court applies a multi-stage procedure, it should assume an obligation to insure that an individual plaintiff be permitted to present evidence at each required stage.

By mixing the standards for handling a multi-plaintiff class action and a single plaintiff action, even though the Supreme Court distinguishes between these,[18] a court must recognize the importance of not confusing standards necessary to exclude an individual class member with those of an individual plaintiff. Certainly after being caught up in the intricacies of comparing two statistical methods, if the court intends to apply individual standards to individual plaintiffs, the mixed standards it is using should be announced and a full and fair opportunity afforded each plaintiff to complete her case.

II. THE COURT OF APPEALS DECISION UPHOLDING THE DISMISSAL OF TROUT'S INDIVIDUAL CLAIMS ALLOWS THE SETTING OF A PRECEDENT WHICH WILL ENCOURAGE EVERY EMPLOYER TO ESCAPE A PRIMA FACIE SHOWING OF DISCRIMINATION WITH THE REBUTTAL THAT THE EMPLOYEE IS "ABRASIVE", AND NOTHING MORE

In a large number of cases, both class and individual, the rebuttal has focused on qualifications, on the selectee, on the comparisons of the selectee to the plaintiff, and on precipitating events such as an illegal "stall-in",[19] carrying a tear-gas pistol,[20] and misrepresenting one's qualifications as a lawyer.[21] In *Burdine,* this Court reminds us that

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[18] 431 U.S. at 357-58, N 44.

[19] 411 U.S. at 803.

[20] *Jones v. Lumberjack Meats, Inc.* 680 F.2d 98 (11th Cir 1982).

[21] *Williams v. Boorstin* 663 F.2d 109 (DC Cir 1980).

"the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." 101 S.Ct. at 1097 Navy's rebuttal to Trout's individual claims provided no basis on which the Court might judge whether the candidates were equally qualified, and in fact did not identify the candidates. These records are largely secret and the employer is in the best position to provide that evidence. Trout's qualifications were adequately demonstrated, but were compared to nothing since the other candidates are in Navy's secret files. Navy's rebuttal consisted of an attack on Trout's personality over a period of time when the employer's actions were largely responsible for her dilemma.[22] Instead of rebutting facts, defendants followed the guidance of Marcus Tullius Cicero: "When you have no basis for an argument, abuse the plaintiff."[23]

Is it not in reality a continuing retaliation for an employer to offer this sort of rebuttal and no other? What more harmful time to retaliate than ten years after the proven wrong, at the rebuttal stage of a Title VII case? The acceptance of such behavior by our nation's courts will allow virtually every employer to escape a prima facie showing of discrimination, since undoubtedly almost all discriminatory employers consider the person who exposes their injustice "abrasive". An employer who knows his wronged employees have no judicial recourse for recovery has a great incentive to continue his discriminatory behavior.[24] Constant vigilence is required to root out

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[22] *Bundy v. Jackson*, 641 F.2d 934, 952 (DC Cir 1981).

[23] Marcus Tullius Cicero, Roman Orator, Statesman, 106-43 BC, *Pro Flacco*.

[24] At trial, the then current Commanding Officer (since March 1, 1980), Captain Paul Pfeiffer, testified as follows:

Q And there have been allegations that vacancy announcements and the crediting plans have been used for preselection. In your experience

discrimination when it is discovered, whether it is in the workplace or the defacing of temples or the burning of crosses to terrorize. As the Fifth Circuit observed, "A person who believes he has been discriminated against because of his race should not be deterred from attempting to vindicate his rights because he fears his employer will punish him for doing so. Were we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further discrimination against those persons willing to risk their employer's vengeance by filing suits." *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982) Subjective, good faith assertions have long been recognized for their discriminatory potential. Often subjective criteria serve only to uphold sexual stereotypes. When totally subjective criteria alone are relied upon for rebuttal of a successful showing of classwide discrimination, they become particularly dubious. Because such a rebuttal in the absence of any other evidence inherently frustrates the purpose of Title VII – the elimination of discrimination – by virtually removing the main tool used in that effort, this portion of the opinion of *Trout v. Hidalgo* cannot be upheld.

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with the promotion process, is that true?

A I think you would have a difficult time in today's environment doing that. The crediting plans and vacancy announcements are screened by Civilian Personnel office. There is a civilian personnel representative, not a technical person, but a civilian personnel advisory person involved in this.

They are sent to the deputy EEO officer, who looks at all the issues of this type and the only way we can try to open the Command up to bring in women and minorities is to open up the criteria where we are hiring people. If we are too narrow, it would certainly look as though it were preselection, so that is screened by a lot of people to make sure it doesn't indicate preselection.

Q Is that a rubber stamping process in your opinion?

A No, I have got many kicked back when I tried. (Trial transcript page 1369.)

The Court of Appeals, in upholding the District Court in these Trout cases, does "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421; 424 U.S. at 771. This is the same court which said in *Bundy v. Jackson* "that where a Title VII defendant is proved a discriminator as a matter independent of the plaintiff's claim of discriminatory denial of a tangible job benefit, the court should ease the plaintiff's burden on that latter claim."[25] This is the same court which said in *Day v. Mathews* "once discrimination has been shown, relief should not be narrowly denied.[26] This is the same court which quotes from *Hackley v. Roudebush*[27] that "the 1972 amendments were designed to serve an equally insistent purpose: 'the rooting out of every vestige of employment discrimination within the federal government.' "[28]

Petitioner believes that she has a Constitutional guarantee to freedom of speech, to petition her government for redress of grievances, to due process before removal of any of her rights or property, and where the law may not be sufficiently specific, that she has a benefit of doubt under the ninth and tenth Constitutional Amendments as one of "the people." Since *Brown v. GSA* makes Title VII the "exclusive judicial remedy" for federal workplace discriminatory claims, then Title VII actions must also have concern for these Constitutional guarantees, and not diminish them. *Brown v. General Services Administration*, 425 U.S. 820, 821 (1976).

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[25] *Bundy v. Jackson*, 641 F.2d 934, 952 (DC Cir 1981).

[26] *Day v. Mathews*, 530 F.2d 1083, 1086 (DC Cir 1976)

[27] *Hackley v. Roudebush*, 171 U.S. App. DC 376, 404, 520 F.2d 108, 136 (1975).

[28] 530 F.2d at 1086.

CONCLUSION

For all these reasons, the Petitioner requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

YVONNE G. TROUT, *pro se*
1546 Brookhaven Drive
McLean, Virginia 22101
Telephone: (703) 356-8024 (Home)
(202) 433-3571 (Work)

Petitioner pro se

February 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1531 — September Term, 1982
Civil Action No. 78-01098

Yvonne G. Trout,
Appellant
v.

John F. Lehman, Jr.,
Secretary of the U.S.
Department of the Navy,
et al.

AND CONSOLIDATED CASE NOS.
82-1405 & 82-1406

BEFORE: Tamm and Wilkey, Circuit Judges and Oliver Gasch*, Judge United States District Court for the District of Columbia

ORDER

It is ORDERED by the Court, *sua sponte,* that the captions of the orders entered on December 2, 1982 are amended by adding thereto:

and consolidated case Nos.. 82-1405 and 82-1406

Per Curiam

For The Court

GEORGE A. FISHER, CLERK

By: /s/_____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1531 September Term, 1982
Civil Action No. 78-01098

Yvonne G. Trout,
Appellant

v.

John F. Lehman, Jr.,
Secretary of the U.S.
Department of the Navy,
et al.

AND CONSOLIDATED CASE NOS.
82-1405 & 82-1406

ARGUED 9-30-82

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For The Court

GEORGE A. FISHER, CLERK

By: /s/_____
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

December 15, 1982

Civil Action Nos. 78-01098 and 73-00055

Appeal Nos. 81-1531 – Yvonne G. Trout v. John F.
82-1405 Lehman, Jr., Secretary of the
82-1406 U.S. Department of the Navy,
et al.

James F. Davey, Clerk
United States District Court
for the District of Columbia
United States Courthouse
Washington, D.C. 20001

Dear Mr. Davey:

Pursuant to the provisions of Rule 41 (a) of the Federal Rules of Appellate Procedure, I transmit herewith, in lieu of mandate, a certified copy of the judgment of this Court (entered without opinion) in the above-entitled case.

Very truly yours,

George A. Fisher
Clerk

Certified copy of judgment for Judge H. Green attached.
Copy of letter only sent to:

Yvonne G. Trout
U.S. Attorneys' Office
Daniel E. O'Connell, Jr.,
Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1531 September Term, 1982
Civil Action No. 78-01098

Yvonne G. Trout,
Appellant

v.

John F. Lehman, Jr., Secretary of the U.S. Department of the Navy, et al.

BEFORE: Tamm and Wilkey, Circuit Judges and Oliver Gasch*, Judge United States District Court for the district of Columbia

ORDER

On consideration of appellant's petition for rehearing, filed November 17, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For The Court

GEORGE A. FISHER, CLERK

By: /s/_____
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § *294(c)*.

APPENDIX B

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1531

Yvonne G. Trout,
Appellant

v.

John E. Lehman, Jr.,
Secretary of the U.S.
Department of the Navy,
et al.

September Term, 1982
Civil Action No. 78-01098
United States Court of Appeal
for the District of Columbia Circuit

Filed Oct. 7, 1982

George A. Fisher
Clerk

Civil Action No. 78-01098

No. 82-1405

Yvonne G. Trout,
Appellant
v.

John E. Lehman, Jr.,
Secretary of the U.S.
Department of the Navy,
et al.,

No. 82-1406

Yvonne G. Trout,
individually and on behalf
of others similarly situated,
Appellant

v.

John E. Lehman, Jr.,
Secretary of the Navy, et al.,

Civil Action No. 73-00055

Appeal from the United States District Court of Columbia

Before: Tamm and Wilkey, Circuit Judges and Gasch,* Senior Judge, United States District Court for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(c).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT, et al., Plaintiffs, v. JOHN F. LEHMAN, JR., et al., Defendants.	)	Civil Action No. 73-0055
YVONNE G. TROUT, Plaintiff, v. JOHN F. LEHMAN, JR., et al., Defendants.	)	Civil Action No. 78-1098

FILED
MAR 24 1982
James F. Davey,
Clerk

AMENDED JUDGMENT

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, it appearing that there is no just reason for delay, judgment is hereby entered in favor of defendants John F. Lehman, et al., and against plaintiff Yvonne G. Trout in Civil Action No. 78-1098 and in favor of defendants John F. Lehman, et al. and against Yvonne G. Trout in Civil

Action 73-0055 to the extent that the Court's decision in that action concerns a claim of Ms. Trout.

Harold H. Greene
United States District Judge

Dated: March 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YVONNE G. TROUT, et al., Plaintiffs, v. JOHN F. LEHMAN, JR., et al., Defendants.	)	Civil Action No. 73-0055
MARIE LOUISE BACH, et al., Plaintiff, v. JOHN F. LEHMAN, JR., et al., Defendants.	)	Civil Action No. 76-1206
YVONNE G. TROUT, Plaintiff, v. JOHN F. LEHMAN, JR., et al., Defendants.	)	Civil Action No. 78-1098

FILED
MAR 10 1982
James F. Davey,
Clerk

MEMORANDUM ORDER

I

Trial on these cases was held from June 16, 1980 to June 27, 1980. During that ten-day trial, the Court heard

numerous witnesses, including several experts who provided thorough and detailed evidence on the statistical aspects of the class action. On April 16, 1981, the Court issued a twenty-page opinion which, in exhaustive detail, discussed the issues and the evidence, with particular emphasis on the question of defendants' liability with respect to the class. See *Trout v. Hidalgo*, 517 F.Supp. 873 (D.D.C. 1981). Thereafter, the Court directed the parties to submit memoranda on the relief issues flowing from the previous findings of liability, and on October 20, 1981, a Memorandum Order was issued setting forth the kind of relief to which the prevailing plaintiffs would be entitled and the procedures by which that relief is to be determined.

On October 30, 1981, the government moved for reconsideration of the April 16 decision, and it is that motion which is presently before the Court.[1] The basic thrust of the motion is that, in the course of preparing for the relief proceedings, defendants collected evidence which requires that the Court vacate its finding of liability and enter judgment instead in favor of defendants. This motion will be denied, for a number of different reasons.

First. These cases have been in this Court for many years, one of them dating back to January 1973. During that period, the government had ample opportunity to collect evidence and otherwise to prepare its case. Indeed, as the trial record shows, the government was fully prepared, and it was permitted to adduce evidence without restriction from the Court. It is not at all clear why the Court should reopen the trial twenty months after its completion

[1]The government also noted an appeal. On February 8, 1982, at the government's request, the time for filing its appellate brief was stayed by the Court of Appeals pending decision by this Court of the motion for reconsideration.

to hear evidence that clearly should and could have been presented while the trial was proceeding.[2]

The government's request is more akin to a demand for a new trial than for reconsideration (see, *e.g.*, *Safeway Stores, Inc. v. Coe*, 136 F.2d 771 (D.C. Cir. 1943)), but in any event it has failed to satisfy the diligence requirements for relief from the judgment. See *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980); *Good luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980); *Carr v. District of Columbia*, 543 F.2d 917, 925-27 (D.C. Cir. 1976); *Tobacco Road v. City of Novi*, 490 F.Supp. 537, 549 (E.D. Mich. 1980); *Bell Telephone Laboratories, Inc. v. Hughes Aircraft Co.*, 422 F.Supp. 372 (D. Del. 1976); 6A Moore's Federal Practice ¶ 59.08[3] (1979); 7 Moore's Federal Practice ¶ 60.23[4] (1979).[3]

Second. The evidence now being proffered is largely cumulative and would be unlikely to produce a different result. That evidence once again reflects defendants' position that women were not disadvantaged in their initial placement in the agency; that pre-Title VII activities may not be considered in Title VII actions for any purpose or

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[2]The evidence now proffered clearly is not of the type that by means of due diligence would not have been available at the time of trial. Defendants' repeated insistence that they collected this evidence as part of their involvement with the relief issues does not address the question as to why this evidence, if it bears on liability, was not produced when the liability phase of these actions was tried.

[3]Under Rule 59, Fed. R. Civ. P., a party has only ten days from the entry of a judgment to move for a new trial. Clearly, defendants did not satisfy this ten-day time limitation. Moreover, to take advantage of the more liberal time standard under Rule 60(b)(2), Fed. R. Civ. P., defendants must take a somewhat stronger showing than under Rule 59 that the evidence could not have been discovered by due diligence. 7 Moore's Federal Practice ¶ 60.23[4] at 273.

under any theory; that the "snapshot" method of statistical analysis and defendants' own regression analysis better reflect the actual situation than the regression analysis employed by plaintiffs' expert; and that no discrimination was proved with respect to the two individual plaintiffs who prevailed. All of these contentions were fully considered by the Court when it rendered its April 16, 1981 decision; the government is not entitled to a reopening of the trial for the receipt of additional evidence on these much-litigated issues.[4]

Third. While conceding that it "is in everyone's interest to resolve this matter as expeditiously as possible" (Defendants' Memorandum of Points and Authorities, p. 21), defendants would nevertheless have the Court retry the liability issues which were laid to rest twenty months ago. They reason that a finding of no discrimination would eliminate any requirement for relief proceedings; after reopening the trial, the Court "will then be able to move this matter towards ultimate resolution by correction of the errors" and that "there is much that remains to be resolved" (Defendants Memorandum, p. 21). These arguments are wholly unpersuasive. To be sure, if the Court dismissed these actions, there would be no need for relief proceedings; but there is simply no warrant in the evidence for such a course. It is equally true that much remains to be done — *i.e.*, consideration of the details of the relief. Resolution of that subject matter is hardly advanced, however, by yet another trial on liability.

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[4]Moreover, the Court's decision on the class action did not rest solely on statistics; there was also substantial testimony by individuals who were discriminated against to support that decision. See *Trout v. Hidalgo, supra,* 517 F.Supp. 873.

Fourth. Defendants also raise an issue as to the burden of proof to be imposed at the individual relief hearings. In its October 20, 1981 Memorandum Order the Court held that each individual class member would have the burden of coming forward, giving the history of his employment with the agency, and listing the assignments or opportunities that were denied as a consequence of discrimination. Once this was done, the burden would then shift to the agency to demonstrate by clear and convincing evidence that its employment decisions with regard to such individual were based on legitimate factors unrelated to the policy of discrimination. Citing *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), defendants argue that the Court has placed too onerous a burden on them.

The Supreme Court in *Burdine* reiterated what had always been the law in this Circuit: that the plaintiff retains the burden of persuasion. *Bundy v. Jackson,* 641 F.2d 934, 951 (D.C. Cir. 1981). *Burdine* holds that once plaintiff has established a prima facie case, the burden shifts to the defendant to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[5] 450 U.S. at 254. Accord *Aikens v. United States Postal Service,* 665 F.2d 1057 (D.C. Cir. 1981); *Bundy v. Jackson, supra,* 641 F.2d 934; and *Day v. Mathews,* 530 F.2d 1083 (D.C. Cir. 1976).

The Supreme Court's clarification of the burden of proof at the liability stage has nothing to do with the burden appropriately to be imposed at the relief stage of a case in which classwide discrimination has been found. Once a court has determined that an employer has

[5]If defendant satisfies this burden, plaintiff is of course given the opportunity to prove the defendant's reasons were mere pretexts.

discriminated against class members, the individual discriminatee should not be forced to prove discrimination in his or her individual case all over again. See *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *League of United Latin American Citizens v. City of Salinas Fire Department*, 654 F.2d 557, 559 (9th Cir. 1981); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1137, n. 18 (8th Cir. 1981). To impose such a requirement would emasculate the finding of classwide liability. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977). As the Court of Appeals for this Circuit has stated. "where a Title VII defendant is proved a discriminator as a matter independent of the plaintiff's claim of discriminatory denial of a tangible job benefit, the court should ease the plaintiff's burden on that latter claim." *Bundy v. Jackson, supra*, 641 F.2d at 952. When the individual discriminatee comes forward with evidence of job opportunities that were denied to him or her, it is appropriate to require the defendants prove by clear and convincing evidence that there were nondiscriminatory reasons for the defendants' employment decision. *Bundy v. Jackson, supra*, 641 F.2d at 953; *Nanty v. Barrows, supra*, 660 F.2d at 1333.

Fifth. Defendants finally[6] complain that they were not given an adequate opportunity for evidentiary hearings on the question of relief. Defendants of course had such an opportunity during the trial and, as the Court observed in its April 16 opinion, it thereafter merely afforded the par-

[6]Defendants also point out, correctly, that in its restatement on October 20, 1981, of the liability found in the April 16, 1981 Opinion, the Court erred. As the remainder of the October 20 Memorandum makes clear, liability was found only with respect to initial grade placements and promotions. The reference to performance evaluations, job assignments, and award procedures in the Memorandum will be stricken.

ties an opportunity for the submission of further memoranda on this issue. Plaintiff attached to its memorandum a report of its expert which explained the relief aspects of the theory that this individual had advanced when he testified as an expert witness at the trial. In any event, defendants will have a full opportunity to submit evidence on the issue of the form of regression which will most fairly reflect the injury suffered by the class a consequence of defendants' actions (see October 20 memorandum, pp. 9-10).

Defendants' motion for reconsideration is untimely (see note 3 *supra*) and it fails to provide any basis either for reconsideration of the Court's previous rulings or for a new trial.[7]

II

In the decision of April 16, 1981, in which the Court found defendants liable with respect to the class, it also ruled that two of the individual plaintiffs were entitled to relief and that the claims of the remaining three plaintiffs lacked merit and would be dismissed. One of the plaintiffs against whom judgment was entered – Yvonne G. Trout – thereupon took the appeal. The Court of Appeals issued an order on January 2, 1982, which provided, *inter alia*, that Ms. Trout's appeal in No. 81-1531 would be held in abeyance pending her application to this Court for a certification under Federal Rule of Civil Procedure 54(b) and the Court's ruling thereon. On February 1, 1982, Ms. Trout filed the appropriate petition with this Court.

[7]The defendants appear to concede that their motion is addressed to the Court's discretion. See Memorandum of Points and Authorities, pp. 5-9. See also *Wilson v. Thompson*, 638 F.2d 801, 803 (5th Cir. 1981); *Audiovisual Publishers, Inc. v. Cenco, Inc.*, 580 F.2d 50, 52 (2d Cir. 1978); 6A Moore's Federal Practice ¶ 59.08[3] at 59-114 (1979); 7 Moore's Federal Practice ¶ 60.23[4] at 273 (1979).

Rule 54(b) provides in pertinent part that when more than one claim is presented, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties upon its express determination that there is no just reason for delay and an express direction for the entry of judgment. The Trout claim, while in one sense intertwined with the claims of the class and those of the other individual plaintiffs, in another is sufficiently separate that the entry of a final, appealable judgment would be warranted. Moreover, as the discussion in Part I *supra* indicates, the ultimate disposition of the class action is likely to be substantially delayed on account of the government's decision to appeal the findings of this Court in advance of the relief stage. There is thus no just cause for delay with respect to the Trout action. It should also be noted that the government has no objection to the granting of the Trout petition.

III

For the reasons stated, it is this 8th day of March, 1982,

ORDERED That defendants' motion for reconsideration be and it is hereby denied, and it is further

ORDERED That the petition of Ms. Trout for certification under Rule 54(b) will be granted.

Harold H. Greene
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al., Plaintiffs,	)	Civil Action
v.	)	No. 78-1098
JOHN F. LEHMAN, JR., et al., Defendants.	)	

FILED
MAR 10 1982
James F. Davey,
Clerk

JUDGMENT

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, it appearing that there is no just reason for delay, judgment is appearing that there is no just reason for delay, judgment is hereby entered in favor of defendants John F. Lehman, et al., and against plaintiff Yvonne G. Trout in the above-captioned action.

Harold H. Greene
United States District Judge

Dated: March 8, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1531 — September Term, 1981
Civil Action No. 78-01098

Yvonne G. Trout,
Appellant
v.

John F. Lehman, Jr.,
Secretary of the U.S.
Department of the Navy,
et al.

No. 81-1532 — Civil Action No. 73-00055
Yvonne G. Trout, Individually
and on behalf of others
similarly situated, et al.
Appellants
v.

John F. Lehman, Jr., Secretary of
the Navy, et al.

BEFORE: Wright*, MacKinnon and Robb, Circuit Judges

ORDER

On consideration of appellees' motion to dismiss and the opposition thereto, it is

ORDERED by the Court that No. 81-1532 is dismissed for want of jurisdiction. It is

FURTHER ORDERED by the Court that No. 81-1531 is held in abeyance until further order of this Court in order to alow appellant to apply for a certification under Federal Rule of Civil Procedure 54(b) in Civil Action 73-55 and to appeal that judgment.

Courts of appeals have jurisdiction to hear final decisions of the district courts. *See* 28 U.S.C. 1291 (1976). A decision in a case is not final until all claims of all parties have been decided. When, as here, the claims of one party to an action are independent enough to warrant an entry of separate judgment, the trial court may do so by making an express determination that there is no just reason for delay and by expressly ordering entry of judgment. *See* Fed. R. Civ. P. 54(b). Without these steps, however, an appeal may not be taken until all claims in each action, including calculation of damages, have been adjudicated.

If appellant wishes to appeal the dismissal of her claim in Civil Action 73-55, she must ask the court below to enter the appropriate order under Rule 54(b). No. 81-1531 has been held in abeyance in anticipation of these steps in order to allow the appeals to move forward together if the court below should grant the Rule 54(b) order.

Per Curiam

*Circuit Judge Wright did not participate in this order.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al., Plaintiffs, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 73-0055
MARIE LOUISE BACH, et al., Plaintiff, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 76-1206

FILED
OCT 20 1981
James F. Davey,
Clerk

MEMORANDUM ORDER

By its Opinion and Order of April 16, 1981 (as amended on May 8 and May 26, 1981), this Court directed the parties to submit memoranda concerning the relief issues in

these consolidated cases.[1] The Court held, after a lengthy trial on the merits, that defendants violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, by engaging in a pattern and practice of sex discrimination with regard to performance evaluation, job assignments, promotion, and award procedures against a class of employees employed by the Naval Command Support Activity (NAVCOSSACT) or by the Navy Regional Data Automation Center (NARDAC) at any time between June 6, 1972 and June 4, 1979. Judgment was entered in favor of the class, and also in favor of two individual plaintiffs with regard to their private Title VII claims.[2] This memorandum concerns the kind of relief to which the prevailing plaintiffs are entitled, and the procedures by which that relief is to be determined.

I

Title VII authorizes a court to award backpay to a plaintiff where the court has found that the employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." 42 U.S.C. § 2000e-5(g). The Supreme Court has noted the "obvious connection" between backpay and the objectives of Title VII, and has concluded that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory

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[1]Originally four actions were consolidated for trial: *Trout v. Hidalgo*, No. 76-0055; *Hardy v. Hidalgo*, No. 76-0315; *Bach v. Hidalgo*, No. 76-1206; and *Trout v. Hidalgo*, No. 78-1098. The Court, in its Opinion and Order of April 16, 1981, dimissed Nos. 76-0315 and 78-1098, and the plaintiffs in those actions are not entitled to relief. See n. 9, *infra*.

[2]One of these individual plaintiffs, Marie Bach, is not a member of the class, while the other, Clara Perlingiero, is a member.

purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1974). Defendants have offered, and the Court can find, no reason why, as a general proposition, backpay should be denied to the plaintiffs in this case; although defendants have reserved the right to appeal the Court's holding of liability, they do not appear to dispute its authority to award relief in the form of backpay to individual class members should liability be upheld. The issue before the Court, therefore, is not whether backpay is justified, but rather, the manner in which backpay is to be awarded to individual discriminatees.

This issue encompasses two conceptually distinct questions: first, who within the class is entitled to receive backpay, and second, how are the amounts of the backpay awards to be calculated. Plaintiffs argue that both of these questions can and should be answered through application of multiple regression analyses[3] of the type upon which plaintiffs' experts relied at trial and which the Court found sufficient to support liability. It is clear, and plaintiffs appear to concede, that a classwide, statistical approach to

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[3]Multiple regression is

> a statistical technique designed to estimate the effects of several independent variables on a single dependent variable . . . [T]he methodology provides the ability to determine how much influence factors such as sex, experience, and education each had had on determining the value of a variable such as salary level. Opinion of April 16, 1981, p. 4.

The analyses performed by plaintiff's experts showed that, taking into account prior experience and education, female employees received substantially lower salaries than male employees.

the question of backpay eligibility (as opposed to the amount of the award) would result in the award of backpay to some class members whose advancement either has never been restrained or has been impeded for reasons other than unlawful discrimination. The statute provides, however, that

> [n]o order of the court shall require . . . the payment to [an individual] of any backpay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(g); see also *Day v. Matthews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). Courts have uniformly held that after a pattern and practice of discrimination by an employer against a class of employees has been proved, the entitlement or eligibility of class members to relief must be determined on an individualized basis, in order to assure that the employer's decisions with regard to particular class members were indeed discriminatorily based. See, *e.g.*, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357-59 (1977); *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 772 (1976); *Mitchell v. Mid-Continental Spring Co. of Kentucky*, 583 F.2d 275 (6th Cir. 1978); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1274 (7th Cir. 1977); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 259 (5th Cir. 1974).

This does not mean, of course, that each member of such a class must set out to prove a case of discrimination from scratch. After an employer's policy of discrimination has been proved, "the force of that proof does not

dissipate at the remedial stage." *Teamsters v. United States, supra,* 431 U.S. at 361. The finding of discrimination with regard to the class affords to the members of the class a presumptive entitlement to relief. *Teamsters v. United States, supra,* 431 U.S. at 362; *Pettway v. American Cast Iron Pipe Co., supra,* 494 F.2d at 259. But the law does place an initial burden on the individual class member to come forward, give a history of his employment with the defendant, and list the assignments or opportunities denied to him due to discrimination. *Stewart v. General Motors Corp., supra,* 542 F.2d at 453; see also *Teamsters v. United States, supra,* 431 U.S. at 362; *Pettway v. American Cast Iron Pipe Co., supra,* 494 F.2d at 259.[4] Once this is done, however, the burden shifts to the employer to demonstrate by clear and convincing evidence that its employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination which has already been proved. *Stewart v. General Motors Corp., supra,* 542 F.2d at 453. Should the employer succeed in meeting this burden, the employee is entitled to come back with evidence that such legitimate factors were pretextual. *Teamsters v. United States, supra,* 431 U.S. at 362 n. 50.

Once it is determined on an individualized basis which members of the class have in fact been harmed by unlawful discrimination and are accordingly entitled to

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[4]Under the *Teamsters* case, a class member is not required to show that he actually applied for an opening in order to qualify for the presumptive entitlement to relief. "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a future gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U.S. at 265-66. Such a non-applicant must show, however, that he would have applied had it not been for the employer's discriminatory practices. *Id.*

backpay, class-wide procedures may be used for computation of the amount of backpay to which these class members are entitled. Such procedures have been held to be especially appropriate where the utilization of an individualized method of calculation would lead the court into a "quagmire of hypothetical judgments" due to the "class size or the ambiguity of promotion or hiring procedures or the illegal practices continu[ing] over an extended period of time." *Pettway v. American Cast Iron Pipe Co., supra,* 494 F.2d at 261; *accord, Wells v. Meyer's Bakery, supra,* 561 F.2d at 1274; *Stewart v. General Motors Corp., supra,* 542 F.2d at 452; see also *Kirby v. Colony Furniture Co., Inc.,* 613 F.2d 696, 705, 06 (8th Cir. 1980). One class-wide method for computing backpay awards discussed approvingly by the Courts of Appeals for the Fifth and Seventh Circuits is the "compatibility" or "representative employee earnings" formula. Under such an approach

> Approximations are based on a group of employees, not injured by the discrimination, comparable in size, ability, and length of employment – such as adjacent persons on the seniority list or the average job progress of persons with similar seniority – to the class of plaintiffs.

Pettway v. American Cast Iron Pipe Co., supra, 494 F.2d at 262; *Stewart v. General Motors Corp., supra,* 542 F.2d at 453; *Bowe v. Colgate-Palmolive Co.,* 489 F.2d 896, 902 (7th Cir. 1973). The Court views plaintiffs' recommended class-wide approach to the computation of backpay – which "uses salary regressions to calculate the earnings of men with years of experience equal to that of each woman, and awards each woman the estimated salary difference"[5]

[5]Plaintiffs' Memorandum on Estimation of Relief, Appendix A, p. 3.

— as closely approximating a "comparability" approach as described above.

II

Applying these principles to the case at bar, the Court will direct the following procedures to be implemented for the determination of backpay awards. Plaintiffs' counsel shall forthwith forward to all class members who can be located a notice and claim form. This form should request the following information: the individual's employment history with NAVCOSSACT or NARDAC (including the positions held by the employee, grade levels, and salaries); employment decisions by defendants which the employee claims were adverse to her, or opportunities which the employee claims were denied to her for discriminatory reasons; and any other information with regard to the employee's education or other qualifications that she might choose to volunteer.[6] Any individual member of

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Defendants strongly dispute the use of plaintiffs' statistical techniques in the relief phase, and claim them to be inaccurate and misleading. They concede, however, that their present criticism does not differ markedly from their attacks on plaintiffs' statistical analyses throughout the trial. Defendants' Memorandum in Response to Court's April 16, 1981 Opinion and Order, p. 8. The Court found plaintiffs' techniques to have sufficient validity to withstand these criticisms at trial, and defendants have proffered no convincing arguments that would cause the Court to reconsider at the present stage.

[6]Defendants shall provide to the members of the class free access to their personnel files to enable them to collect the necessary information.

If a class member claims to have been denied a promotion, assignment, or other such opportunity but no record exists of an application for such an opportunity, she should include specific and detailed evidence, by way of affidavit or otherwise, that she would have applied for the position or opportunity were it not for the deterrent effect of defendants' discriminatory practices and policies

the class who wishes to be considered for backpay eligibility will be required to submit this completed form to the Court no later than thirty days from the date of this Memorandum.

With the submission of this completed form, a class member will be deemed to have met her initial burden of proof under the principles outlined above.[7] The Court will refer these individual claims either to a United States Magistrate or to a Special Master (depending upon the number of claims at issue) for the holding of hearings at which defendants will be afforded the opportunity to show that the decisions made with regard to each claimant were based on reasons other than unlawful discrimination, and each claimant will have the opportunity to rebut any such showing on the grounds of pretext.[8] See 42 U.S.C. § 2000e-5(f)(5); Rule 53, Federal Rules of Civil Procedure.

Where the Magistrate or Special Master finds defendants unable to rebut the presumption in favor of a class member's entitlement to relief, he shall rely upon the table contained in Appendix A and the Supplement to Appendix A of Plaintiff's Memorandum to calculate the amount of backpay to which the class member if entitled. The backpay tables submitted by plaintiffs merit further comment in two respects.

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[7]It is hoped by the Court that at this point the majority of the claims will be settled through negotiations between the government and the individual claimants through their counsel. For those claims still outstanding, however, the remainder of the above procedures will be instituted.

[8]With regard to Yvonne Trout and Charlene Hardy – both of whom are members of the class and both of whose private discrimination claims were denied – any submission of a notice and claim for would be futile, since the government has already shown at trial, and the Court has already found, that any adverse treatment of them was supported by reasons apart from sex discrimination. See *Sledge v. J. P. Stevens & Co., Inc.*, 585 F.2d 625, 638 (4th Cir. 1978).

First, Tables A-2 and A-3 compute backpay awards for a period from July 1, 1970 to June 30, 1972. An award of backpay for that period would, in effect, augment the remedies made available to federal employees by the 1972 amendments to the Civil Rights Act as interpreted by the Court of Appeals for this Circuit, which has held that the remedies available to federal employees under section 717(c) of the Equal Employment Opportunities Act of 1972 (42 U.S.C. § 2000e-16(c), effective as of March 24, 1972) apply to discrimination occurring before the effective date of the Act only where judicial or administrative proceedings were pending as of that date.[9] Since proceedings in this case were not begun until after March 24, 1972, the Magistrate or Special Master may not include in his final awards backpay relating to employment before that date.

Second, the statistical methodology used by plaintiffs' experts to compute backpay differs somewhat from that approved by the Court as a basis for liability. The statistical analysis presented at trial, introduced to prove that discrimination existed relied upon linear equations, whereas the regressions used by plaintiffs to approximate the salary structure of men and women as a basis for

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[9] *Klapac v. McCormick*, 640 F.2d 1361, 1366-67 (D.C. Cir. 1981); *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974). But, as stated by the Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299, 309 n. 15),

> This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued.

In the liability phase of the present action, the Court indeed took into account the effects of pre-Act discrimination as they affected post-Act salary differentials. Opinion of April 16, 1981, p. 8.

establishing backpay awards are based on logarithmic equations. It is not entirely clear from the submissions of the parties which of the two approaches would result in the calculation of more equitable backpay awards. Plaintiffs merely state that a logarithmic approach is preferable because it provides larger awards to persons at higher grades and more experience, consonant with the evidence that promotion to the upper grades is the source of the largest salary differential between men and women employed by defendants;[10] defendants merely assert that plaintiffs are changing the form of their regression analysis in mid-stream only because it happens now to be to their advantage.[11] These arguments do not enable the Court at this time to resolve which of these two forms would provide the better relief. For that reason, the Court will refer the choice between these two forms of regressions to the Magistrate or Master charged with their application. He may hold further hearings or require further briefings by the parties to aid in his determination which of the two forms might result in the more accurate approximation of the injury suffered by the class of discriminatees.

III

Plaintiffs also ask for injunctive relief prohibiting discrimination of the type practiced in the past by defendants, and imposing upon them affirmative future goals

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[10]Plaintiffs' Memorandum Addressing Relief, p. 16; Appendix A, p. 3, 25.

[11]Defendants' Reply Memorandum, p. 14. Defendants have also submitted their own regression analysis for relief purposes; but since these regressions improperly take into account variables such as starting grade, which are under the control of the discriminating employer, they must be rejected. See Opinion of April 16, 1981, pp. 47-48a, 58a.

serving to reduce hereafter the disparity in salaries and promotions. They propose that promotion objectives be established for the next three years by specifying a target percentage of women at upper grade levels (or, in the alternative, that future promotion rates for women be set at the same multiple as that of men for the same period). To encourage the agency to meet these goals, plaintiffs propose a rather novel "front pay" approach, in which regression analysis would be applied to the future so as to compensate for any short-falls in defendants' meeting their promotion goals.

Although relief in the form of goals or quotas has been approved by many appellate courts (see *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978)), courts have generally agreed that such relief is "appropriate only under limited and compelling circumstances." *Sledge v. J.P. Stevens, supra,* 585 F.2d at 646; *United States v. Chicago,* 549 F.2d 415, 437 (7th Cir. 1977); *Kirtland v. New York State Department of Correctional Services,* 520 F.2d 420, 427 (7th Cir. 1975). Courts have been particularly reluctant to order promotion quotas, primarily because of the possibility of injuring blameless majority-group members through reverse discrimination. See Schlei & Grossman, *Employment Discrimination Law* 1211 (1976), 332-33 (1979 Supp.); see also *Kirtland v. New York State Department of Correctional Services, supra,* 520 F.2d at 427 (discussing the hazards of reverse discrimination). Where effective relief can otherwise be afforded, the preference is to avoid the imposition of quotas. *Sledge v. J.P. Stevens, supra,* 585 F.2d at 646.

The Court finds no compelling need here for the imposition of a goal or a quota for future promotions. Class members will be compensated for the injuries suffered

from past discrimination through the backpay procedures outlined above, and the Court is able satisfactorily to ensure that defendants maintain a nondiscriminatory course in the future by less drastic means than a system of promotion quotas. For a period of the next three years, NARDAC will be required to maintain its promotion files, and to report to the Court on a semi-annual basis upon the results of its promotion actions. See *Teamsters v. United States, supra,* 431 U.S. at 361. During that period, the Court will maintain jurisdiction over the action in order to monitor defendants' performance and ensure equal opportunity in the future. See *Watkins v. Washington,* 472 F.2d 1373, 1377 (D.C. Cir. 1972).

IV

Remaining is the relief to be awarded to the two individuals who prevailed in their private claims at trial, Marie Bach and Clara Perlinguero. On the basis of the evidence and the findings of the Court and after consideration of the parties' memoranda, the following relief will be ordered for Marie Bach: (a) retroactive promotion to a GS-14 as of March 13, 1976, and to a GS-15 as of May 8, 1978;[12] (b) restoration to the duties, responsibilities and functions of a GS-15 security manager; (c) backpay, consisting of (i) the difference between the GS-13 salary she earned and the GS-14 salary she would have earned during the period between March 13, 1976

[12]Defendants claim that Ms. Bach merits no higher than a GS-13 which is the grade from which she was demoted in 1979. This, however, ignores the Court's findings that Ms. Bach was twice removed from positions of responsibility for which she was qualified, and that defendants failed to classify her position at a grade comparable to that of other security specialists in the Navy with similar functions. Opinion of April 16, 1981, pp. 24-25.

and May 7, 1978, and (ii) the difference between the GS-13 salary she earned and the GS-15 salary she would have earned from May 9, 1978 until such date as she receives her promotion to GS-15; (d) restoration of her performance evaluations from 1975-1976 to that of "outstanding"; and (e) reasonable costs and attorney's fees.

The relief to Clara Perlinguero shall be as follows: (a) retroactive promotion to a GS-13 as of September 1, 1971 through November 26, 1972, and to a GS-14 as of September 1, 1979,[13] (b) backpay, consisting of the larger of (i) the amount she would receive as a member of the class under the class backpay procedure, *supra,* or (ii) the difference between the GS-12 salary the earned and the GS-13 salary she would have earned from September 1, 1971 until November 26, 1972, plust the difference between the GS-13 salary she earned and the GS-14 salary she would have earned from September 1, 1979 until such date as she receives her promotion to GS-14; (c) substantial career development training in the area of telecommunications and in areas that will enable her to meet the new standards in the GS-334 series; (d) upgrading of her performance evaluations from January 1, 1972 to the present so as to place her within the upper third of her grade class; and (e) reasonable costs and attorney's fees.

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[13]Plaintiffs request that Ms. Perlinguero be promoted to GS-15 as of September 1, 1971, because on that date a reorganization took place causing a white male to be placed in a supervisory role over her at a GS-15 level. There is no basis in the record from which to infer that, had there been no discrimination, Ms. Perlinguero would have been promoted three grades (from a GS-12 to a GS-15), however. On the other hand, defendants' contention that Ms. Perlinguero should be given no promotion from her present grade of GS-13 fails to take into account the Court's findings that when she was made project leader in September of 1979, she was not given the GS-14 rank that her male predecessor had possessed. See Opinion of April 16, 1981, pp. 26-28.

third of her grade class; and (e) reasonable costs and attorney's fees.

V

For the reasons stated above, it is this 19th day of October, 1981,

ORDERED That plaintiffs' counsel shall prepare a notice and claim form as outlined in the above Memorandum, and that he shall send such form forthwith to all class members who can be located; and it is further

ORDERED That any member of the class wishing to be considered for backpay eligibility submit to the Court a completed notice and claim form no later than thirty days from the date of this Order; and it is further

ORDERED That defendant NARDAC shall maintain its promotion files through October 1, 1984, and shall report to the Court twice each year during this period (on April 1 and October 1) on the results of its promotion actions; and it is further

ORDERED That defendants shall afford relief to plaintiffs Marie Bach and Clara Perlinguero as outlined in Part IV of the above Memorandum.

/s/ _____
Harold H. Greene
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al., Plaintiffs, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 73-55
CHARLENE HARDY, Plaintiffs, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 76-315
MARIE LOUISE BACH, et al., Plaintiff, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 76-1206

YVONNE G. TROUT, et al., Plaintiffs,	)	Civil Action
v.	)	No. 78-1098
EDWARD HIDALGO, et al., Defendants.	)	

FILED
APR 16 1981
James F. Davey,
Clerk

OPINION

These four consolidated cases raise individual and class sex discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*[1] the defendants in all of these actions are officials of the Department of the Navy and an agency of the Department of the Navy formerly referred to as the Naval Command Support Activity (NAVCOSSACT) and, since March, 1977, as the Navy Regional Data Automation Center (NARDAC).[2]

NAVCOSSACT was established in 1962 as the center of Navy computer operations for national defense purposes. The organization grew from about 250 employees in 1962 to one employing over 1,000 individuals in the late 1960's. By the early 1970's, however, lesser United States involve-

[1]Although plaintiff Bach, in Civil Action No. 76-1206, also asserts a claim under the Age Discrimination in Employment Act of 19867, as amended, 29 U.S.C. 633a (1974), plaintiffs did not argue this claim in their trial brief and the statistical evidence at trial was devoted exclusively to sex discrimination. By order filed December 13, 1976, the Court struck the claims for relief involving individual disciplinary action.

[2]For the sake of simplicity, both of these agencies as well as the several individual defendants are generally hereinafter referred to as NARDAC.

ment in foreign conflicts and fiscal restraints placed upon the agency resulted in a reduction in the size of the organization, and consequently fewer highgrade employees were authorized and fewer promotions occurred. In 1977, NAVCOSSACT was dissolved in the course of a reorganization of the Navy's automated data processing activities (ADP), and its personnel and resources were combined with personnel and resources of the Navy Material Command Support Activity, the Navy Accounting and Finance Center, and the naval District Washington, D.C., to form NARDAC. NARDAC develops computer systems and documents for computer systems, trains personnel in the operations of systems, and delivers the systems to user organization.

Plaintiffs Yvonne G. Trout and Clara Perlingiero, both computer systems analysts, brought the first of the currently-pending actions, Civil Action No. 73-55, and they are also the representatives of the class previously conditionally and now fully certified in that case consisting of "all female professional technical employees employed by [NAVCOSSACT] or [NARDAC] at any time between June 6, 1972, and June 4, 1979." Trout is also the plaintiff in Civil Action No. 78-1098, in which she alleges retaliatory actions arising from her initial claim. Charlene Hardy, the plaintiff in Civil Action No. 76-315, is a retired computer programmer from NARDAC and a member of the designated class. Marie Louise Bach, a NARDAC security manager, and Joan Swann Creighton, director of the NARDAC Training Department, are the plaintiffs in Civil Action No. 76-1206, but they are not members of the class.

I

The class action aspects of this lawsuit involve an alleged pattern and practice of sex discrimination in defendants' hiring, performance evaluation, job assignment, promotion, and award procedures. Their resolution revolves primarily around the statistics submitted by the parties and the analysis of those statistics by the parties' experts.[3] As might be expected, the evidence adduced by plaintiffs in these areas differs sharply from that advanced by defendants. Moreover, as will be explained below, neither analysis is wholly free from defects or ambiguities. Some of these problems are attributable to the underlying data (see note 4 *infra*) while others are to a degree inherent in the various methods of analysis (see, *e.g.*, p. 16 *infra*) which almost inevitable required those performing them to make trade-offs in terms of inclusiveness and specificity. On balance, however, for the reasons indicated below, the court finds plaintiffs' statistical proof to be the more reliable.

That proof consists essentially of multiple regression analyses of raw statistical data furnished to plaintiffs by defendants in the course of discovery.[4] Multiple regression

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[3]However, as discussed in Part IV *infra*, testimony concerning actual personnel practices was also adduced on the class action issues.

[4]The data used by both parties' experts for statistical analysis consisted of a computer tape and a computer printout furnished to plaintiffs by defendants in response to an interrogatory. The tape included eighteen recent job actions taken with respect to each employee from 1970 to 1979, as well as the employee's age, sex, date of entry in federal service, date of hire by, and departure from, NARDAC, and the prior employing agency. The printout included age, sex, educational level, date of entry in federal service, date of hire by NAVCOSSACT, and all job actions between 1972 and 1977. These data, from which all subsequent analyses were derived, were first requested by plaintiffs on May 9, 1980, five weeks before the trial began. Some

is a statistical technique designed to estimate the effects of several independent variables on a single dependent variable. Properly used in a case such as this, the methodology provides the ability to determine how much influence factors such as sex, experience, and education each have had on determining the value of a variable such as salary level.[5] The analysis also enables an observer to cumulate effects of the various factors so as to determine the degree to which explanation of the dependent variable can be attributed to the independent variables in combination.[6] Regression analysis is well recognized by the literature and the courts in Title VII litigation.[7]

Plaintiffs' expert[8] began his analysis with the undisputed fact that the average salary for female employees

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of the deficiencies in the parties' statistical analysis can be traced directly to certain gaps in these two sources of data. Had either party focused its attention earlier on the critical role statistical analysis would play in the proof of this case, it might have been possible to obtain and analyze the personnel records themselves as a basis for more accurate determinations.

[5]See Fisher, Multiple Repression in Legal Proceedings, 80 Colum. L. Rev. 702, 721-25 (1980).

[6]The best measure of the degree of explanation of movement of the dependent variable by the model is known as R^2. A value for R^2 of 1.0 represents total explanation; zero indicates no explanation.

[7]See, *e.g.*, *Presseisen v. Swarthmore College*, 442 F.Supp. 593 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3rd Cir 1978); *Agarwal v. McKee and Co.*, 16 E.P.D. ¶ 8301 (N.D. Cal. 1977); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 514 (5th Cir. 1976); *Pennsylvania v. Local 542, Operating Engineers*, 19 E.P.D. ¶ 9028 (E.D. Pa. 1978); Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum.L.Rev. 737 (1980); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv.L.Rev. 387 (1975); Fisher, supra* note 5.

[8]Plaintiffs' principal expert was Mahlon R. Straszheim, Ph.D., a professor of economics at the University of Maryland.

at NARDAC has throughout the relevant period been considerably lower than that of males. At the beginning of that period, in 1972, women earned $2,700 less than men. that is, 82 percent of the male salaries; at the end of the period, in 1979, women earned $4,300 less than men, or 84 percent of the male salaries.[9] The salary differentials throughout this period reflect the relative concentration of women in NARDAC in the lower civil service grade levels. During that period, women constituted about 20 percent of the NARDAC labor force. They were consistently overrepresented in the lower grades, with their share varying between 21 and 50 percent for GS-7 through GS-11 and between 42 and 100 percent for GS-5, and they were with equal consistency underrepresented in the upper grades, where they occupied between 3 and 10 percent of the jobs at GS-14 and above. In the middle positions there also was a contrast, although it was less stark. Women held approximately 24 percent of the GS-12 positions, and about 10 percent of the GS-13 positions.

With these salary differentials clearly established, plaintiffs' expert sought to determine next, on a year-by-year basis between 1972 and 1979,[10] whether the disparity could be accounted for by differences between men and women in education and experience,[11] or whether it was more likely to be attributable to sex discrimination. To accomplish this analysis, the expert witness specified for

[9]The relative decrease in the percentage gap when compared to the increase in the dollar gap is accounted for by inflation.

[10]No regression was run for 1978.

[11]Experience and education were largely determinative of salary at NARDAC. In 1972, for example, each year of service at the agency tended to increase the salary level by $1,209, each year of service at other federal agencies by $194, and each year of "nonfederal service" by $152. Employees with graduate degrees tended to receive $3,788 more than those with no college experience.

regression a linear model which included dummy variables for level of education.[12] years of NARDAC service, years of other government employment service, years of potential nongovernment experience between date of receipt of last educational degree and date of entry in federal service, and sex.[13] The dependent variable was salary.

When prior experience and education were thus taken into account, female employees still received substantially lower salaries than men, the yearly differential attributable to sex ranging from $2,200 to $3,500.[14] Since

[12]The 1979 regression model did not include education variables because education data were unavailable. Plaintiffs' expert reported that this alternative specification altered the magnitude of the sex coefficient only slightly and did not change the statistical significance of the coefficient.

[13]For a discussion of the problems surrounding the accuracy of the experience and education factors used by plaintiffs, see Part III *infra*.

[14]Women received $2,271 less than men in 1972, $2,189 less in 1973, $3,437 less in 1974, $2,547 less in 1975, $2,885 less in 1976, $3,106 less in 1977, and $3,109 less in 1979. These differences in salaries were statistically significant at the .01 level, that is they would be expected to arise by chance less than one percent of the time if there were no discrimination based on sex. In each regression, all of the other variables showed up as significant at the .01 level, with the exception of the dummy variables for college. The R^2's, representing the explanatory fit of the model overall range from .42 to .64. Plaintiffs' expert also performed several variant regressions, including running of the 1979 model using a population of employees hired only since 1972, when Title VII became applicable to federal employees; running of the 1979 model using subpopulations categorized by agency origin within NARDAC; and running of data for both 1977 and 1979 using a logarithmic, rather than a linear, equation. Each of these variants produced statistically significant results which were wholly consistent with those of the basic model. The expert finally offered evidence to show that women were treated less favorably than men in grade level placement in hiring and promotion decisions. Because this evidence merely amounted to a repetition of evidence already built into the regression conclusions, and was substantially less probative than the regression analysis, the Court has not considered it on an independent basis.

there never was any suggestion by the government that factors other than education or experience could legitimately account for the differences,[15] the Court would clearly have been justified, absent some explanation, to draw the conclusion that equally qualified female employees of NARDAC consistently received lower salaries on the average than male employees and, accordingly, that they had been the victims of improper discrimination.

II

The government's answer to plaintiffs' statistical case was two-fold. It argues initially that various defects in the analysis renders its ultimate conclusions unreliable and that, inasmuch as plaintiffs have the burden of proof, this unreliability demands that judgment be entered against them. Additionally, the government presented statistical evidence through its own experts, arguing that, even if plaintiffs' statistical analysis were deemed to constitute a prima facie case, that case was adequately rebutted by the government's statistical findings. The Court considers each of these arguments in turn.

The government's objections to the reliability of plaintiffs' statistically-based conclusions may be summarized as follows. First, it is claimed that plaintiffs' expert improperly permitted pre-1972 statistical evidence and evidence of other agencies' actions to intrude into his analyses. In this regard, defendants assert that the inclusion of individuals hired before 1972 (when Title VII was not applicable to federal employees) and of individuals who transferred from other federal agencies (whose

[15]See note 11 *supra;* but see also pp. 45-47a *infra.*

salaries were presumably already predetermined) would inappropriately subject the defendants to liability for actions that either were not legally cognizable when they occurred or were attributable to agencies other than NARDAC. Second, defendants argue that plaintiffs' expert failed to include in his analysis several relevant factors and that for this reason the coefficient suggesting discrimination was biased. And third, it is contended that the experience factor used by plaintiffs' expert, who included as experience the entire period between completion of education and hiring by the government, reflects not so much actual experience as merely age.

A. Defendants' objection to the failure of plaintiffs' expert to eliminate all pre-1972 data is not as persuasive as might appear at first blush. Although discriminatory conduct which occurred solely prior to March 24, 1972, is not directly actionable in Title VII suits against the federal government,[16] it has been recognized that evidence of such conduct can

> in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change.[17]

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[16] *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

[17] *Hazelwood, supra*, 433 U.S. at 309 n. 15. For example, on that basis, if promotion decisions within the period of legal responsibility indicate an adverse impact on a protected group, but there is too small a sample within that period on which to base a finding of statistical significance, the data for earlier periods may be aggregated with the information for more recent periods. See Finkelstein, *supra* note 7, at 746; *Vera v. Bethlehem Steel Corp.*, 448 F.Supp. 610, 615 (M.D. Pa. 1978); *Parson v. Kaiser Aluminum and Chemical Corp.*, 575 F.2d 1374, 1385, *rehearing denied*, 583 F.2d 132 (5th Cir. 1978); *Patterson v. Youngstown Sheet and Tube Co.*, 440 F.Supp. 409, 411-13 (N.D. Ind. 1977).

Between 1967 and 1972, NARDAC engaged in a number of practices which unfairly discriminated or had the strong potential to discriminate against women – among them the conducting of evaluations of employees on a subjective basis by male supervisors;[18] the failure to advertise promotion opportunities; and the preselection of male employees for higher level positions by male supervisors. It is likely that such discrimination before 1972, even if coupled with neutral employment practices since then, produced actionable continuing discriminatory effects after 1972, particularly since Civil Service regulations patterned after the so-called Whitten Amendment (5 C.F.R. § 300.602 (1968); P.L. 253, 82d Cong., 1st Sess. (1951)), constrained the maximum allowable rate of grade promotion.[19] Under these circumstances, it was ap-

[18]All of the department and division heads and other management officials at NARDAC (with the exception of one black male) were white males. Of the approximately 215 to 220 project leaders, only 6 were women. See *Rowe v. General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *Ste. Marie v. Eastern Railroad Ass'n*, 458 F.Supp. 1147, 1162 (S.D.N.Y. 1978); *Neely v. Grenada*, 438 F.Supp. 390, 407-08 (N.D. Miss. 1977); *Stastny v. Southern Bell Tel. & Tel. Co.*, 458 F.Supp. 314, 345-46 (W.D.N.C. 1978); *Kyriazi v. Western Electric Co.*, 461 F.Supp. 894, 923 (D.N.J. 1978).

[19]The situation is analogous to the effect of racial discrimination by labor unions that is succeeded by use of neutral seniority rules, or of discriminatory voting registration practices followed by neutral, but particularly arduous, requirements. In such cases, courts have not hesitated to hold that "freezing" the effects of prior discrimination is actionable. See, *e.g.*, *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 450-51 (5th Cir. 1971); *Quarles v. Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1968); *United States v. Dogan*, 314 F.2d 767, 772-73 (5th Cir, 1963).

propriate for plaintiffs' expert not to exclude completely the effects of pre-1972 conditions.[20]

With regard to defendants' objection that plaintiffs included employees who transferred from other agencies with "predetermined grades and salaries," NARDAC did not make a convincing showing that it had no control over initial grade determinations.[21] Although the agency was, of course, entitled to attempt to demonstrate in its own statistical analysis that if grade placement decisions by other agencies were excluded no vestige of discriminatory results would remain, the Court could not appropriately dismiss plaintiffs' own analytical conclusion upon that basis. The logical product of defendants' theory would be a requirement that plaintiffs in Title VII cases must join as defendants all government agencies from which any employees ever transferred — a proposition which suggests that the objection is not compelling.[22]

B. The other objections made by defendants to plaintiffs' statistics essentially raise legal issues relating to the

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[20]No practical method of separating the effects of pre-1972 and post-1972 discrimination in regression analysis was suggested by defendants or is readily apparent. See *Segar v. Civiletti*, C.A. No. 77-0081, slip opinion at p. 10 (D.D.C. Feb. 6, 1981). Plaintiffs did perform one regression including solely employees hired after 1972 and found statistically significant discrimination in salaries. That study, however, was not a suitable replacement for broader regressions, if only because its exclusion of long-time employees precluded analysis of promotion practices in higher grades.

[21]See pp. 57a-58a *infra*, for a discussion of the issue regarding NARDAC's liability for initial grade determination, which in significant respects also applies to transferees.

[22]A court recently dealt with the identical issue by assuming that, in the absence of evidence to the contrary, transferor agencies and transferee agencies discriminated equally. See *Segar v. Civiletti*, *supra*, slip opinion at p. 14 n. 4.

burden of proof. Certainly, plaintiffs' expert did not, in his analysis, account for each of the factors that the government suggests should have been considered. It is also true that a model which incorporated additional potentially relevant factors (such as type or quality of education and experience) would form a more perfect foundation for determinations regarding allegations of discrimination. However, defendants have furnished no evidence that inclusion of the missing variables or refinement of others would have altered rejection of the hypothesis of no discrimination. Indeed, they failed to offer any evidence indicating that type of eduction and experience or quantity of experience per age was distributed unequally among the women and men in the NARDAC population.

To be sure, defendants did suggest that technical, computer-related education and experience are not equally distributed in the general population between men and women,[23] and they have also argued that women are more likely than men to leave the labor force to raise children, and, hence that on the average they possess less experience per age than men. However, the generalities offered by lay witnesses on these subjects are inadequate, by themselves, to undermine plaintiffs' analysis. Certainly, the Court would not be justified in accepting mere sex stereotypes as an adequate rebuttal. What was required in this circumstance was substantial, expert supporting evidence keyed to the population here involved, but such evidence was not forthcoming. See *Vuyanich v. Republic National Bank*, 24 FEP Cas. 128, 193-94, 199-200 (N.D. Tex. 1980).

[23]Census data were submitted in support of this proposition.

C. Thus, the basic question is – have the plaintiffs satisfied their burden of proof by adducing the type of statistical evidence that they did, or were they affirmatively and as part of their own case required to do more?[24]

Under current law, a plaintiff has the burden of establishing a prima facie case of sex discrimination under Title VII.[25] In class action litigation under that statute, statistics often play an important role in both parties' claims regarding the existence of discrimination.[26] Indeed, statistics alone may suffice to establish a prima facie case.[27] As the Supreme Court made it clear in *Hazelwood School District v. United States, supra,* 433 U.S. at 307-08,

> [w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima

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[24]In an ideal world, all of the necessary proof would be fully available, and the decision could then be said to be based on correctness to a scientific or mathematical certainty. However, in an actual trial context, the Court must, absent unusual circumstances, make its decision on the basis of what evidence has been presented.

[25]Under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the plaintiff in a Title VII case has the burden of establishing a prima facie case; the defendant may then rebut the prima facie case by demonstrating legitimate business reasons for the apparent discrimination; and plaintiff may then attempt to show that the reasons given amount to a pretext. See *Texas Department of Community Affairs v. Burdine,* 49 U.S.L.W. 4214 (1981).

[26]See *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977).

[27]*Castenada v. Partida,* 430 U.S. 482 (1977); *United States v. International Union of Elevator Constructors, Local No. 5,* 538 F.2d 1012, 1015 n. 6 (3rd Cir. 1976); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 259 (3rd Cir. 1975); *Davis v. Califano,* 613 F.2d 957 (D.C. Cir. 1979).

facie proof of a pattern or practice of discrimination.[28]

As indicated, parties in complicated Title VII actions are increasingly using multiple regression analysis, such as that conducted in the instant case, to separate the phenomenon of discrimination from a myriad of innocent interacting factors.[29] While such analysis can assist significantly in making the refined and sophisticated

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[28]Where racial or sex-based disparities are particularly gross, plaintiffs have often relied on mere percentage differentials between the work force and the general population to base a claim of discrimination (see B. Schlei and P. Grossman, *Employment Discrimination Law*, 332 nn. 80-82 (1979 Supp.), although, as the Supreme Court pointed out in *Hazelwood, supra*, 433 U.S. at 308 n. 13, such comparisons are only highly probative when skills required for the job are ones "that many persons possess or can fairly readily acquire." Some courts have also allowed such data to be used for skilled or managerial positions, but more generally plaintiffs alleging discrimination in non-entry-level jobs have been required to produce statistical evidence comparing the composition of the work force with the makeup of the segment of the population possessing the qualifications relevant to the jobs at issue. See Schlei and Grossman, *supra*, at 322-23 nn. 83-84, 86-90. Similarly, when the focus of the suit is alleged discrimination in promotion decisions, some courts have held that evidence of a disparity in the composition of entry-level jobs relative to upper-level jobs constitutes a prima facie case, while others have required that plaintiff compare only those entry-level jobholders demonstably qualified for promotion with employees holding high positions. See *id.*at 324-25 nn. 92-93.

[29]"Multiple regression is well suited to [distinguish sex discrimination from differences in qualifications such as education and experience] fairly precisely. Moreover, without a multiple regression study it is difficult to see how it could be decided. The raw comparison of average wages for women and for men may make one suspicious, but it cannot tell one anything definite." Fisher, *supra* note 5, at 721.

judgments required,[30] it would be erroneous to impose upon the party relying upon this technique the burden of incorporating every conceivable refinement and disproving every contingency. As Professor Finkelstein has pointed out,[31]

> [I]n criticizing models it is possible to speculate endlessly that different data, forms of equation, or explanatory variables would yield significantly different and superior results. Compelling definite calculations will bring such easy speculation down to earth.[32]

In the case at hand, plaintiffs used regression analysis to attempt to eliminate such possible explanations for the salary differentials as educational and experience factors. They succeeded in doing so to a substantial extent. The

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[30]The Court does not interpret *Movement for Opportunity v. General Motors Corp.*, 22 FEP Cas. 1010 (7th Cir. 1980), which is heavily relied upon by defendants, to the contrary. In that case, in which the court found defendants' work force "flow" statistics more probative on the issue of discrimination than plaintiffs' statistics, plaintiffs merely compared work force percentages with potential work force composition figures and did not perform any regression analysis. On the basis of that evidence, moreover, the court held that plaintiffs had made a prima facie showing, albeit one that defendants adequately rebutted.

[31]Finkelstein, Regression Models in Administrative Proceedings, 86 Harv.L.Rev. 1442, 1466 (1973).

[32]Judge Robinson of this Court recently adopted this same position in *Segar v. Civiletti, supra,* when he held, slip opinion at p. 42, that

> [w]hen a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant, in his rebuttal presentation, must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.

government argues, in essence, that because plaintiffs did not refine the variables in their regression to an absolute degree, they failed in meeting the required burden of proof. The Court declines to impose upon Title VII plaintiffs so impractical a requirement.

This conclusion is especially compelling when, as here, the deficiencies in plaintiffs' statistical proof may to a substantial extent be attributed to the defendants. In the course of discovery, plaintiffs requested NARDAC's computerized personnel records describing employees' grade, salary, promotion, training, job performance, education, and prior employment experience, among other information. Defendants replied that much of the information was unavailable, and they furnished instead a computer tape which provided only the data used by plaintiffs' expert in preparing his statistical analysis. To be sure, plaintiffs' request was made relatively late in the history of this long-pending litigation. Nevertheless, plaintiffs cannot legitimately be faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendants and was not furnished either to plaintiffs or to the Court.[33]

D. Defendants rely to the contrary principally upon two cases in which courts have criticized regression analyses.

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[33]See *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1297 (8th Cir. 1978); *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 80 n. 27 (E.D. Pa. 1977), *rev'd on other grounds*, 582 F.2d 827 (3rd Cir. 1978). One clear purpose of discrimination law is to force employers to bring their employment processes into the open. See Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 Col.L.Rev. 900, 908 (1972).

In *Agarwal v. McKee and Co.*, 16 E.P.D. ¶ 8301 (N.D. Cal. 1977), the plaintiffs sought to support their claims of racial discrimination with a multiple regression, but the Court refused to credit the findings of discrimination, citing that their failure to include variables representing types of education and types of experience. In the view of that court, regressions which aggregate individuals of all positions, and which treat "all job positions as fungible, involving equal levels of knowledge, skill and responsibility" are invalid. 16 E.P.D. at 5581. In the instant case, all members of the class are professional technical employees with generally similar job skills, and it is not at all clear that the *Agarwal* ruling would be pertinent here.[34] In any event, the Court does not agree with the view that an aggregation across job lines necessarily destroys the probative value of regressions. Absent a demonstration that such an aggregation imports a bias into the conclusions, the methodology is not inappropriate. Indeed, as is discussed in more detail below, the technique is superior to methods which entail a fragmentation into population so small that statistical analysis loses much of its power to find any discrimination.[35] To the extent that *Agarwal* may

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[34]A position similar to that taken by the court in *Agarwal* was also expressed in a recent decision of Judge Gasch of this District. See *Valentino v. United States Postal Service*, C.A. No. 77-331, at 83 (D.D.C. Jan. 16, 1981). Defendants' reliance upon that case in this context is likewise misplaced, and for similar reasons. The class in that action included "economists, computer experts, business managers, personnelists, engineers, statisticians, lawyers, accountants, and secretaries." Slip opinion at p. 45. The instant case, of course, involves no such aggregation of disparate occupations.

[35]Defendants' response to plaintiffs' expert's objection to the aggregation by year only in defendants' promotion analysis was that the most accurate anlaysis would have been to disaggregate by each separate promotion decision. See Defendants' Post-Trial Brief Regarding Satistics pp. 10-11, n. 4. Although defendants are correct that no inaccuracies are introduced by such disaggregation, it is also true

be read as suggesting that type and quality of education and experience must always be included in a valid statistical model proposed by a Title VII plaintiff, it appears to be simply wrong and has for that reason been justly criticized. In the words of Professor Finkelstein,

> The failure to code type or quality of prior experience or education should more properly fall on the employer than on the plaintiff, since such coding would be relevant only to the extent the employer could demonstrate that differences in type of education or prior employment experience were validly related to the requirements of the job.[36]

In *Presseisen v. Swarthmore College*, 442 F.Supp. 593 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3rd Cir. 1978), both parties conducted sophisticated regression studies to buttress their conducted sophisticated regression studies to buttress their contentions regarding the practice of sex discrimination in faculty employment decisions. The court in that case found that neither side had adequately supported its own regression analysis, and in that posture it saw only two basic alternatives; to ignore both sets of statistical analysis or to consider both studies as if they suffered no defects. After concluding that it did "not believe that the statistics give rise to any inference whatsoever," it held that plaintiffs had not made out a prima

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that no comparative information is generated until individual cases are aggregated. The cost of following defendants' suggestion seems inordinately high.

[36]Finkelstein, Judicial Reception, *supra* note 7, at p. 744. It may be noted, too, that the court did not hold that the plaintiffs had failed to meet their burden of proof but merely that they did not adequately refute defendant's presentation of legitimate nondiscriminatory reasons for its conduct.

facie case. That conclusion, however, must be viewed in the peculiar context in which it arose. The action was brought by faculty members at a liberal arts college, and the court's decision necessarily was colored by the fact that it is difficult to quantify and thus to incorporate into a regression analysis such factors as scholarship, teaching ability, and the like which play a predominant role in employment decisions at such an institution.[37] The instant case does not to the same degree involve factors of such elusiveness. Moreover, defendants here did not offer their own regressions to correct the deficiencies they complained of in plaintiffs' analysis.[38]

For the reasons stated, the Court rejects the various objections profferred by the government and it concludes that, based upon the statistics, plaintiffs have established a prima facie case of sex discrimination in initial grade placement and promotion against the class of professional technical women employed at NARDAC.

III

To rebut this prima facie case, the government, through its experts,[39] introduced its own statistical evidence. This evidence, based essentially upon the same data as that used

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[37]See also, *Marimont* v. *Califano*, 464 F. Supp. 1220, 1227 (D.D.C. 1979); Finkelstein, *supra*, note 7, at p. 744.

[38]See pp. 59a-63a *infra*, for a discussion of the regressions defendants did conduct.

[39]Defendants' experts were Peter Lewin, Ph.D., assistant professor of economics, University of Texas at Dallas; and Robert R. Hill, Ph.D., assistant professor, Texas A&M University.

by plaintiffs, consisted of a so-called cohort analysis and various independent regression.[40]

A. The cohort analysis examined the flow of male and female employees of the same grade level through NARDAC's promotional system. The experts divided the work force into groups by the year in which the employees joined the agency and the GS grade at which they entered. The promotion experiences of each of these groups or "cohorts" over time were examined to compare the relative progress of men and women. On the basis of this analysis, the government's experts concluded that NARDAC's promotion system had not had any disproportionately adverse impact on female employees.

Although defendants' statistics did support that conclusion, several defects inherent in their use of the statistics severely mitigate its force.[41]

First and foremost, the cohort analysis necessarily divided the population under examination into extremely small segments or groups.[42] As population size decreases, a disparity must be increasingly large to be statistically significant, for the division of observations into small

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[40]Defendants also offered a promotion analysis to refute allegations of discriminatory promotion practices. However, because this analysis suffers from a number of the same defects that limit the probative value of defendants' other statistical analysis (such as excessive disaggregation and inability to reflect discrimination in hiring, see *infra*) and is inherently less probative than regression analysis (see pp. 40a-42a, 49a-50a *supra*), it does not significantly assist defendants.

[41]In a similar situation, it has been said of cohort analysis (*Segar* v. *Civiletti*, *supra*, slip opinion at p. 42), that it "was irreparably flawed . . . and is devoid of probative value."

[42]For example, many of the cohorts contain only two, three, or four employees.

groups necessarily reduces the detectable level of significance. See *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 340; *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620-21 (1974); *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 Harv.L.Rev. 387, 417-18 (1975). The failure of the government's analysis to reject, in many instances, the hypothesis of no discrimination in promotions is in large measure attributable to the fact that it selected a statistical method with extraordinarily low power to detect sex-based disparities.

Second, the analysis does not include any cohort which was composed solely of men or solely of women.[43] As a result, 15 percent of the women and 38 percent of the men were excluded from the analysis,[44] again severely restricting the usefulness of any conclusions drawn from data.

Third, the analysis conducted by defendants' experts assumed that the employees studied were placed in an appropriate salary grade at the outset, and it therefore could not and did not detect any bias in the hiring and placement process.[45] The government appears to justify this ignoring of possible discrimination in initial placement with the

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[43]Such cohorts are necessarily excluded, because there is no way to make a comparison between men and women for a cohort with employees of only one sex.

[44]Defendants offered no evidence that the exclusion of these employees did not bias their conclusions.

[45]For example, a male high school graduate and a female with an advanced degree who were hired improperly at the same grade in a particular year would, under the cohort method, continue to be inappropriately studied as if they always belonged at the same grade level. Moreover, if the woman subsequently were ever promoted more rapidly than her male counterpart, her case would be counted as evidencing discrimination in favor of, rather than against, women.

argument that NARDAC had no influence on placement decisions, which were allegedly completely controlled by the Civil Service Commission, and that NARDAC therefore would not be legally liable for any bias at time of hiring. However, whatever may have been the formalistic Civil Service classification system, defendants failed to demonstrate that NARDAC had no influence on initial grade placement decisions. In fact, the interplay among job description, assigment to positions, distribution of duties, and classification standards leaves ample room for flexible treatment and hence for variation and discrimination. See also, *e.g.*, pp. 47a-48a *supra* and note 67 *infra*.

Furthermore, even if all authority for improper initial grade placement were assumed to rest with the Civil Service Commission, the resulting disparities in grade level remaining over several years could still be properly attributable to NARDAC. In such a case, either NARDAC failed to promote equitable individuals who were discriminated against at hiring (which would constitute direct discrimination by NARDAC) or operation of the Whitten Amendment regulations locked in the effects of the earlier discrimination (see p. 46a *supra*). In either event, the assumption implicit in defendants' statistics that discrimination in initial placement is irrelevant to the case is incorrect and undermines their analysis.

Fourth, defendants' cohort analysis did not take into account pre-1972 discrimination. yet, although the government bears no legal responsibility *per se* for pre-1972 actions, as indicated *supra* (pp. 44a-46a) such actions should have been considered to the extent that they continued to affect post-1972 salary levels.[46]

[46]Defendants point to two recent decisions as sustaining contrary conclusions. In *O'Brien* v. *Sky Chiefs, Inc.*, 23 FEP Cas. 65 (N.D. Cal. 1980), cohort analysis was used to controvert allegations of sex

Because of the deficiencies described above, the Court finds defendants' cohort analyses to be insufficiently reliable to rebut plaintiffs' case.

B. The remaining statistical evidence offered by defendants consisted primarily of regression analysis. Again, there were several shortcomings with the presentation of these studies, each of which is independently sufficient to render them inadequate to rebut plaintiffs' prima facie case of discrimination.

As pointed out above, defendants did not choose to perform any regressions correcting the specification errors they claimed afflicted plaintiffs' regressions. In an employment discrimination case, in which the defendant employer has the greatest access to potentially relevant employment data, the burden is on it to produce and use

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discrimination. But in that case the statistical evidence adduced by the plaintiffs consisted only of percentage disparities in rank, and the court quite properly granted summary judgment to defendants, after finding that neither party's evidence contradicted the other's and that plaintiffs had not made out a prima facie showing of discrimination. In the instant case, by contrast, the statistical evidence is conflicting, and the Court has already concluded that plaintiffs have proved a prima facie case.

Judge Gasch of this Court, in *Valentino* v. *U.S. Postal Service, supra,* entered judgment for defendant after a trial that included complicated statistical evidence. In that case, as in this one, plaintiffs produced multiple regression analyses as part of their prima facie case, and defendant offered cohort anlyses and regressions in rebuttal. Some of the factors leading the Court there to conclude that defendant's statistical evidence was more probative than plaintiffs', such as improper aggregation of disparate occupations, are not present here. Beyond that, this Court respectfully differs with a number of other conclusions reached in that case: *e.g.*, the appropriateness of regressing salary on grade level in a suit alleging discrimination in initial placement and promotion; the proper treatment of possible pre-1972 discrimination; and the usefulness of regression analysis given its inability to account for intangible factors.

such data in developing its statistical case (see p. 52a *supra*). Defendants' failure to include the variables of type of education and experience and a more accurate measure of quantity of experience in their regressions must be interpreted as a concession that these refinements in the specification of the model would not have affected the rejection of the hypothesis of no discrimination.

Further, several of the regressions defendants did perform were not themselves offered as evidence. Instead, defendants relied on a few sparse sentences of descriptions of regressions allegedly performed, claiming that they revealed no unfavorable treatment of women. The cursory nature of the support for this conclusion, in four consolidated cases in which seven years of litigation have generated thousands of pages of documentation and argument, requires the court to assign little probative weight to this finding.[47]

Finally, the regressions that defendants both performed and offered into evidence with enough specificity to be entitled to consideration are inadequate to rebut plaintiffs' case, Defendants regressed the log of salary on the education, experience, and sex of NARDAC employees who had been hired since 1972 and who had not transferred from other government agencies. As noted *supra*, for various reasons, including the use of small populations necessitated by the restrictions upon the employees includ-

[47]One such regression, it is clear from the description, would not be entitled to weight, even if introduced into evidence. By including grade level when hired as an independent variable, the experts improperly absolved defendants from any liability for discriminatory initial grade placement. It is commonly accepted that it is inappropriate to include as an independent variable a factor within defendants' control unless it has been established that they did not discriminate in exercising that control. See *Presseisen, supra*, 442 F. Supp. at p. 614; and see, p. 58a *supra*.

ed by defendants, the power of the analysis to detect sex discrimination was significantly eroded.[48] The Court therefore concludes that these regressions are entitled to little weight.

For all of the above reasons, the Court finds that defendants' evidence has not "raise[d] a genuine issue of fact as to whether [they] discriminated against the plaintiff[s]." *Texas Department of Community Affairs v. Burdine, supra,* 42 U.S.L.W. at p. 4216. Because defendants have failed to produce evidence that would allow the Court to conclude that they did not unlawfully discriminate, the Court, applying the burden-of-production rule articulated by the Supreme Court in *Burdine,* finds that defendants have not rebutted plaintiffs' prima facie case of discrimination.

IV

The court having concluded that plaintiffs have established a *prima facie* case and that defendants have been unable to rebut their proof, might leave the matter to rest there, with judgment on the class action aspects of this suit being entered for plaintiffs on that basis alone. However, the Court has considered evidence other than the statistics in support of and in opposition to the class action claim, and it finds that such evidence substantially strengthens the conclusion that plaintiffs are entitled to a finding in their favor.

There was testimony from a number of present and former employees of NARDAC concerning various

[48]The low power of the model can be observed from the fact that almost all of the education variables in these regressions were likewise not statistically significant. This, of course, does not prove that educational achievement had no effect on salaries at NARDAC.

discriminatory practices, long after 1972, including a denial of supervisory opportunities to women, assignment of women to lower level positions, and the preselection[49] of men for supervisory positions.[50] The Court was especially impressed by the testimony of several former employees of the agency who were very credible witnesses and who related both specific instances and general impressions of discrimination against women at NARDAC. Some of these individuals left NARDAC for other federal employment and thereafter advanced to higher grades far more rapidly than had been possible at NARDAC.[51]

Defendants' witnesses denied the existence of discrimination in the areas under their control. However, several of them testified that preselection and failure to post vacancy announcements had been practices within the agency, and another conceded that the technical shortcomings which impeded the advancement of one of the plaintiffs herein had been overlooked in the case of at least

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[49]Several government witnesses conceded that preselection was occurring at various times at the agency. Compare Federal Personnel Manual, chapter 335, subchapter 3.

[50]Additionally, Judge June Green of this Court found discrimination on the basis of "sex or race" against one black female employee of NARDAC. *Robinson* v. *Warner*, 8 E.P.D. ¶9452 (D.D.C. 1974). And see, notes 66 and 67 *infra* and text thereto.

[51]For example, Ann Eakin testified that a "buddy system" operated at NARDAC from which women were excluded; women were seldom given project leader status; and they were generally retained in the less desirable programming and documentation areas. When she transferred to the Veterans Administration she quickly advanced to a GS-13. Stacy Day, who left NARDAC to join the United States Marshal's Service, testified that career opportuniteis were few for women at NARDAC, and men were being given most of the more desirable assignments. Kathy Schabaker and Crystal Halichi both supported this testimony; and both advanced far more rapidly after they left NARDAC than they had before.

one male. Overall, defendants' witnesses, whatever their subjective beliefs, and indeed their individual good faith, fell far short of rebutting plaintiffs' proof of entrenched sex discrimination.

The evidence compels the conclusion that during the years in question NARDAC was an agency – perhaps not atypical in Navy terms during that period – where men were expected to be in positions of leadership and where women were relegated to tasks involving less authority, less discretion, less opportunity, and less pay.

For the reasons stated, the Court concludes that plaintiffs have proved discrimination against the class, that defendants have been unable to refute that proof, and that the class of plaintiffs are entitled to judgment in their favor.[52]

In addition to the class action, lsuit was brought on behalf of five individual plaintiffs.[53] Some of these individuals have proved discrimination or retaliatory action;[54] others have not.

A. Yvonne Trout complains primarily[55] that (1) she

[52]The relief aspects are discussed in Part VI *infra.*

[53]The testimony of the individual plaintiffs also tended, in varying degrees, to support the class action aspects of this lawsuit.

[54]In order to prevail on a retaliatory action claim, a plaintiff must demonstrate a causal connection between protected activities and adverse action. See, *e.g., EEOC* v. *Locals 14 and 15,* 438 F. Supp. 876 (S.D.N.Y. 1977).

[55]The allegations made by these plaintiffs, and particularly those of Ms. Trout, are at best confusing in that major and minor complaints are indiscriminately recited, sometimes without a clear delineation of what is claimed to be sex discrimination or retaliation and what is contended to be mere supporting data. Since 1975, Ms. Trout has filed at least five additional EEO complaints, the last one in February 1980. Thus, she complained, *inter alia,* that in 1972 she was improperly passed over for six promotions and that after filing a grievance her

was transferred on a detail in 1970 from one part of NARDAC where she claims to have performed well to another with which she was unfamiliar and for which she was less well suited; and (2) in 1975,[56] after she had been detailed as an acting program manager to the Automated Data Processing Program Reporting System (ADPPRS) program, reprisals were taken against her on account of her EEO complaints and her advocacy of the rights of women employees.

Ms. Trout objected to the 1970 transfer on the ground that it constituted an unfair labor practice and violated her rights as a federal employee. Nevertheless, it is clear that the agency's action was legitimate. A need arose in the agency for computer systems analysts and programmers in a higher priority project, and Ms. Trout as well as a male

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rank on a technical evaluation roster was substantially reduced. The 1972 promotion actions did not involve discrimination on account of sex: two of the individuals promoted were women. However, it appeared that merit promotion procedures had not been strictly followed, and Ms. Trout was for that reason granted a promotion to GS-14. As for the technical evaluation roster, the diminished level of her performance is corroborated by a Letter of Caution and Requirement Ms. Trout received on April 13, 1971, wich indicates a "failure to perform to the level of [her] assessed capability." Of the remaining complaints, one involved the closing of a door by another program manager who sought to escape a dispute with Ms. Trout; another was directed at, among others, male and female employees of the Navy, the Department of Justice, and the U.S. Attorney's Office; and the last one involves a promotion to GS-15 she unsuccessfully sought. While not all of these matters are discussed in this Opinion, the Court has considered all of the allegations properly before it and the evidence relating to them, and finds the complaints to be without merit. (It may also be noted that Ms. Trout was hired by NARDAC after interviews with three men all of whom, according to her allegations, are part of a pattern of sex discrimination against her at the agency.)

[56]This complaint is embodied in No. 78-1098.

computer analyst were detailed to that project. The individual who made the selection, and who was a credible witness, testified that she was chosen only because of she appeared well suited for this assignment. Following her objections, and after a four-day hearing,[57] all the complaints were rejected. Almost two years later, Ms. Trout for the first time injected the issue of sex discrimination.[58] However, in addition to being late, the claim, for the reasons detailed above, wholly lacks substantive merit.

Ms. Trout's 1975 program was cancelled essentially because she was a poor manager and because the program, largely for that reason, did not meet with success. Because of her abrasiveness, a number of her most expert subordinates left, and she generally found it difficult to work with their replacements, whether men or women. The program Ms. Trout headed at the time was an important one for NARDAC and that agency had no interest in seeing it fail, through cancellation or otherwise. Ultimately it turned out, however, that in view of the lack of success the program had achieved under her leadership, there was no realistic choice other than to cancel it.[59] The Court finds that none of the actions surrounding the 1975 program cancellation were motivated either by discrimination or by retaliation.

There is no question but that this particular plaintiff has had problems at NARDAC, but these problems were essentially due to her personality rather than her sex. Throughout her tenure at the agency, Ms. Trout complained, almost incessantly, often about extremely petty

[57]There also were numerous informal conferences with the commanding officer and others.

[58]For that reason, her sex discrimination complaint may well be untimely.

[59]Nevertheless, Ms. Trout retained her GS-14 grade.

bureaucratic matters.[60] While no doubt this plaintiff is highly intelligent, she was not as successful at NARDAC as she expected to be largely because she has consistently been unwilling to accommodate herself to the legitimate needs and concerns of her supervisors, co-workers, and subordinates,[61] whether male or female[62] Notwithstanding its conclusion regarding the class, the Court finds that Ms. Trout has failed to prove her individual claims with respect to either of the actions she has brought, and these claims will be dismissed.

B. Marie Bach,[63] security specialist in charge of automatic data processing (ADP), was removed from her position in 1976, and a younger white male was placed in charge of the program. The reason given for this change was that her successor, because of his computer background, was better able to carry out the ADP security

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[60]A female co-worker, Lois Henry, testified that Ms. Trout informed her that she would let the project slip two years, and "embarrass the hell out of" NARDAC's commanding officer. Daniel Foster, a black supervisor at NARDAC, stated that he was "outraged" by Ms. Trout and that he regarded her actions as amounting to strong and persistent insubordination.

[61]Charles Bremer, a principal target of Ms. Trout's complaints, testified that Ms. Trout was almost constantly badgering him and that she represented the most difficult experience of his professional life. The Court regards Bremer as a credible witness.

[62]For example, at the time of the 1970 transfer, she consistently and abrasively objected to the detail, keeping a public "count down" calendar. Again, when a controversy ensued between plaintiff and one of her supervisors regarding a female lieutenant he had hired, she became embroiled in that particular controversy although she had promised that she would not become involved in personnel matters outside her immediate jurisdiction.

[63]Ms. Bach is the plaintiff in No. 1206-76, but she is not a member of the class in No. 55-73 because she was not a professional technical employee of NARDAC.

functions. The Court finds this to have been a mere pretext for discrimination on account of sex.[64]

While there are legitimate differences of opinion on the technical issue of whether ADP security specialists should more appropriately have a background in security or one in data processing, the evidence here shows that these technical issues were not the predominant reasons for the personnel actions regarding this plaintiff. Ms. Bach was described by most witnesses as a highly respected security manager.[65] it is also clear that computer analysts work frequently, if not usually, under the supervision of security specialists, and that the latter ordinarily have overall responsibility for ADP security systems. That, indeed, was the situation at NARDAC until Ms. Bach's removal in 1976.

Rear Admiral Nance, who at the time of that removal was in charge of navy equal employment opportunity matters, ordered that all of her duties be returned to her.[66] NARDAC complied temporarily and with obvious reluctance, but ultimately it carried out its original plans, to the detriment of this plaintiff.[67]

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[64]The Court also discounts the explanations provided by NARDAC management that Ms. Bach was being transferred to give her policy-making authority.

[65]The head of the ADP security inspections under the Chief Navy Material Command described her as one of the best such managers he had ever observed.

[66]Admiral Nance also directed that plaintiff's performance evaluation rating be upgraded, that an EEO committee closely monitor opportunities for management development among women at NARDAC, and that EEO training be given to managers and supervisors at the agency.

[67]Among other discriminatory actions taken against Ms. Bach were the award of unwarranted inferior performance ratings (which were not upgraded notwithstanding Admiral Nance's orders); the removal of her office to an undesirable location; failure to provide her with ap-

For the reasons stated, the Court finds that plaintiff Bach has sustained her burden of proof with regard to her claim under Title VII, that defendants have failed to rebut that proof, and that she is entitled to a judgment in her favor.

C. Charlene Hardy[68] complained about failure to receive training to which she claims to have been entitled, and the receipt of a Letter of Caution and Requirement and a Letter of Reprimand in 1974. The Court finds that there is no merit to her complaints.

Ms. Hardy was not permitted to attend a seminar in advanced computer technology because the course was too complex given her experience and abilities and because of several other shortcomings from which she suffered, in particular her habitual tardiness. Insofar as the two disciplinary letters were concerned, they were fully justified by her performance. Ms. Hardy arrived late on so many occasions that she had amply exhausted her leave.[69] She was counseled a number of times,[70] and when ultimately her leave record failed to improve, she was given a letter of reprimand. The patience NARDAC exhibited with respect to this particular employee was the antithesis of discrimination.

The Court finds that defendants did not violate Title VII in their treatment of Ms. Hardy either with respect to

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propriate training; and failure to classify her position at a grade comparable to that of other security specialists in the Navy with similar functions.

[68]Ms. Hardy is the plaintiff in No. 76-315 and she is also a member of the classs in No. 55-73.

[69]Leave without pay was first denied but then granted.

[70]Plaintiff had a number of family problems which contributed to her tardiness. The agency, commendably, adjusted her work hours to allow her to take care of her family obligations, but her attendance did not improve.

the matters referred to above or in any other respect,[71] and her complaint will accordingly be dismissed.[72]

D. Clara Perlingiero's[73] complaint originated with a reorganization in 1971 of an important ADPPRS project in which she had been an assistant project leader performing satisfactory work. As a result of the reorganization, more people were assigned to this project, it was renamed Code 70, and three white males were appointed to supervise it. One of the new supervisors, Charles Bremer, was placed in charge, and he soon received a promotion to GS-15. Another new supervisor, Robert W. MacPhail, a retired military officer who had little background in computers and none in ADPPRS, was rapidly promoted to a GS-14 position that had not been advertised competitively. Ms. Perlingiero alleges that MacPhail was preselected for that position, and her allegation in that regard is supported to an extent by the acknowledgment of a defense witness that preselection did occur, apparently fairly routinely, during that period. At the same time, Ms. Perlingiero remained at her GS-12 level and was given only low-level programmer's duties and responsibilities.

Immediately after she filed a complaint of discrimination in 1971, Ms. Perlingiero's evaluation dropped from the top one-third to the very bottom of the GS-12 group at the agency. At about the same time, she was transferred to the communications systems department; she was given no

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[71]Likewise unsupported are her claim that she was pressured not to file an EEO complaint and that she was instructed, for discriminatory or retaliatory reasons, not to associate with another black female employee of NARDAC.

[72]Ms. Hardy voluntarilty resigned from the federal service in 1976 after the birth of a child.

[73]Ms. Perlingiero is a named plaintiff and class representative in No. 73-55.

supervisory training or assignments which would enhance her promotion potential; and she was kept in the communications systems department from 1972 until September, 1979.[74] In January of 1974, the Navy concluded that procedural irregularities had occurred in connection with applications Ms. Perlingiero had made in 1972 and promoted her to GS-13, her present rank.

In September, 1979, plaintiff was made a project leader. However, she remained at her GS-13 rank even though her male predecessor had been a GS-14, and she apparently was given lower level duties and responsibilities than those which had been exercised by that predecessor. In addition, a new layer of three supervisory positions was established at the GS-14 level; Ms. Perlingiero applied for all three; and all of them were again given to white males who were junior to her.[75]

In May, 1980,[76] Ms. Perlingiero's title was changed from project leader to "point of contact." She testified that, once again, her responsibilities were being eroded in favor in male supervisors, and she also complained of an announced transfer of her communications systems group of Chelthenham, Maryland, as part of the Naval Telecommunications Command, a change she alleges is retaliatory and will further adversely impact her career.

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[74]This plaintiff had no background whatever in the subject matters under the jurisdiction of that department.

[75]Plaintiff claims that these individuals, too, were preselected.

[76]Inasmuch as the entire matter involving this plaintiff was before the Court, it has also considered the 1980 claim. See, *e.g.*, *Silver* v. *Mohasco Corp.*, 602 F.2d 1083 (2d Cir. 1979), *rev'd on other grounds*, 447 U.S. 807 (1980); *Ortega* v. *Construction & General Laborers' Union No. 390*, 396 F. Supp. 976, 980 (D. Conn. 1975).

Several of her supervisors testified to Ms. Perlingiero's shortcomings in some technical fields, claiming that the real leaders in her department were in systems programs rather than in analysis, and that she simply lacks the background to advance. However, the Court is convinced that the various actions taken against this plaintiff were based on sex discrimination and on retaliation, as distinguished from objective efficiency-related factors Ms. Perlingiero's evaluations were favorable until she filed her EEO complaints; she was thereafter given the lowest possible rating and then transferred to a department in which she had no background. She was repeatedly passed over for promotion in favor of males, some of whom had inferior credentials or were junior to her, and at least one of whom clearly was preselected for the position. Finally, she has been deprived of assignments commensurate with her various positions, responsibilities, and assignments that would have enabled her to prove her ability and to advance to higher-level positions. For the foregoing reasons, the Court finds that this plaintiff has sustained her burden of proof with regard to her claim under Title VII and that defendants have not rebutted this proof, and judgment will accordingly be entered in her favor.

E. Joan Creighton[77] complains primarily[78] about her removal from her administrative position and her downgrading to a lower ranked job, and secondarily about the fact that, while she is presently acting as an interim director of training, she has not been granted that position on a permanent basis.

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[77]Ms. Creighton is a plaintiff in No. 78-1206, but she is not a member of the class in No. 55-73 because she is not a female professional technical employee of NARDAC.

[78]Like the other individual plaintiffs, Ms. Creighton also raised a host of lesser issues and grievances. All of these matters have been fully considered by the Court.

Ms. Creighton was hired in 1974 at a GS-11 level as an assistant to Murray Silverman, a GS-15 computer systems analyst who had been performing personnel duties for the commanding officer. In December, 1975, when Silverman's resignation became effective, Ms. Creighton took over his personnel duties. At about the same time, she was promoted to a GS-12.

The major reorganization of the Navy ADP in 1977 combined NAVCOSSACT, for which Ms. Creighton worked, with three other organizations to form NARDAC.[79] The direction of the personnel office of the new organization, to which Ms. Creighton aspired, was given to one Lois Henry, a female with a GS-13 who had been performing similar personnel duties for NMCSA, one of the other merged organizations, and Ms. Creighton became her subordinate.

The defendants' evidence showed that Ms. Creighton's performance as personnel director had been poor, and several witnesses testified that she ran a disorganized office.[80] Lois Henry, who was given the position to which Ms. Creighton aspired, was clearly better qualified by every appropriate measure, and there was nothing improper about this personnel action. The Court finds that sex discrimination or reprisals were not even remotely involved.[81]

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[79]See p. 39a *supra.*

[80]In contrast, Ms. Henry's performance had been rated outstanding.

[81]Capt. Paul Pfeiffer, commanding officer of NARDAC, testified that Ms. Creighton told him that Captain Clairmont (the previous commanding officer) had made a mistake and that she intended to get some money out of it.

In 1977, Ms. Creighton was transferred to the Training Department, and she has been the acting director of that department since that time. The director position has been classified GS-13 in the GS 334 computer series. Ms. Creighton herself, who is classified in the GS 301 personnel series, cannot qualify for the computer series classification because she does not have the technical background to supervise computer specialists in their technical duties. The Court is convinced that defendants are making a good faith effort to reclassify Ms. Creighton's position so that she can qualify for a GS-13. If an when that occurs, she will presumably be promoted. In short, this particular plaintiff has failed to sustain her complaints of discrimination and retaliation with sufficient evidence, and her claim will accordingly be dismissed.

VI

The briefs submitted by the parties thus far have not focused to any substantial extent on the relief that should be granted herein, particularly with respect to the class. Accordingly, the parties shall, within twenty days hereof, submit memoranda discussing methods for the determination of entitlement to relief on behalf both of the individual plaintiffs and of the members of the class. These proposals should include a discussion of the feasibility and desirability of making individualized determinations for all individuals potentially entitled to relief as opposed to utilization of some averaging formula.[82] In this connection, the parties should also address the specific pro-

[82]If an averaging formula is used, it might include reliance upon the statistics presented to the Court.

cedures, formulas, and other relevant details applicable to each method.

The parties shall also address the question whether the relief issues should be resolved by the Court, by a Magistrate, or by a special master. Finally, the parties' submissions should discuss the relationship between the relief for the named plaintiffs and the relief for members of the class. Within ten days of the filing of the memoranda, reply memoranda dealing with these various issues may be submitted.

Harold H. Greene
United States District Judge

Dated: April 16, 1981

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YVONNE G. TROUT, et al., Plaintiffs, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 73-55
CHARLENE HARDY, Plaintiffs, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 76-315
MARIE LOUISE BACH, et al., Plaintiff, v. EDWARD HIDALGO, et al., Defendants.	)	Civil Action No. 76-1206

YVONNE G. TROUT, et al., Plaintiffs,	)	Civil Action
v.	)	No. 78-1098
EDWARD HIDALGO, et al., Defendants.	)	

FILED
APR 16 1981
James F. Davey,
Clerk

ORDER

For the reasons set forth in the Opinion of this date accompanying this Order, it is this 16th day of April, 1981,

ORDERED That the class as conditionally certified on April 5, 1973, as amended by the Court's order filed June 18, 1979, be and it is hereby finally certified; and it is further

ORDERED That judgment be and it is hereby entered in favor of plaintiffs and against defendants with regard to the class action claims, and it is further

ORDERED That judgment in favor of plaintiff Marie Bach and against the defendants be and it is hereby entered with regard to plaintiff's individual claim of sex discrimination, and it is further

ORDERED That the age discrimination claim of plaintiff Marie Bach be and it is hereby dismissed; and it is further

ORDERED That judgment be and it is hereby entered in favor of plaintiff Clara Perlingiero and against defendants with regard to plaintiff's individual claim, and it is further

ORDERED That the individual claims of plaintiffs Yvonne G. Trout, Charlene Hardy, and Joan Creighton be and they are hereby dismissed, and it is further

ORDERED That the parties shall submit within twenty days hereof the memoranda concerning relief described in the accompanying Opinion, and that reply memoranda may be submitted within ten days after the filing of the initial memoranda.

Harold H. Greene
United States District Judge

APPENDIX G

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in pubic facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * * * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

* * * * * * * * *

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practiCe for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual

of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

* * * * * * *

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

* * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706.

* * * * * * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection *(c) or (d),* the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political*

subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action

without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission,* or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employmen. records relevant

to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not

limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1982 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * * * * * *

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to

carry out its responsibilities under this section. The Civil Service Commission shall –

> *(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;*
>
> *(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and*
>
> *(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.*

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to–

> *(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and*

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as ap-agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities, under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

* * * * * * *

APPENDIX H

Memorandum of July 23, 1962
(Equal Employment Opportunities for Women)

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

As I recently advised the Chairman of the President's Commission on the Status of Women, the Attorney General has rendered an opinion that will make it possible to open up greater employment opportunities for women in the Federal service. He has held that the question whether positions in the Federal Government may be filled by men only, by women only, or by qualified members of either sex, is a matter which may be regulated by the President.

I have previously directed the Chairman of the Civil Service Commission to review pertinent personnel policies and practices affecting the employment of women and to work with you to assure that selection for any career position is made solely on the basis of individual merit and fitness.

I intend that the Federal career service be maintained in every respect without discrimination and with equal opportunity for employment and advancement. The opinion of the Attorney General now enables me to direct you to take immediate steps so that hereafter appointments or promotion shall be made without regard to sex, except in unusual situations where such action has been found justified by the Civil Service Commission on the basis of objective non-discriminatory standards.

The White House,
July 23, 1962.

John F. Kennedy

Executive Order 11478, – as Amended[1] Equal Employment Opportunity in the Federal Government

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority veted in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

[1]Amended by Executive order 11590, which made this order applicable to the United States Postal Service and to the Postal Rate Commission.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as ap-

propriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shal encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this order.

SEC. 6. This order applies (a) to military departments as defined in section 102 of title 5, Unitd States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the

employees in those positions. This order does not apply to aliens employed outside the limits of United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

SEC. 8. This order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.[1]

Richard Nixon

The White House
August 8, 1969.

[1]Added by Executive Order, 11590, April 23, 1971.

APPENDIX I

FPM Supplement 296-31 **May 17, 1967**

Subchapter S3. Procedures Applicable in Changes Other Than Conversions, Promotions, Demotions, and Reassignments

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S3-13. DETAILS WITHIN AN AGENCY

a. Commission approval. If a detail within an agency is to exceed 120 calendar days, or if there is a question about the propriety of a detail, prior approval of the Commission should be obtained by directing Standard Form 59 to the Commission office which supervises the Board of Examiners with examining jurisdiction for the position in question (see FPM chapter 300, subchapter 8).

b. Recording the detail. Details in excess of 30 days are recorded on STandard Form 52 or other standard from considered appropriate by the agency. This record must be filed on the right side of the employee's Official Personnel Folder. ***Exception:*** The report is not required for the detail of a career or career-conditional employee who is being assigned to perform duties of a position which is either an identical additional position or a position of the same grade, series code, and basic duties as the position he is regularly assigned to (see FPM chapter 300, subchapter 8). If a detail is recorded on SF 50, do not send a copy to the Commission.

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Federal Personnel Manual **August 26, 1970**

Subchapter 8. Detail of Employees

8-1. DEFINITION

A *detail* is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail. Technically, a position is not *filled* by a detail, as the employee continues to be the incumbent of the position from which detailed.

8-2. PRESENT COVERAGE OF SUBCHAPTER

The material now covered in this subchapter relates only to details within the same agency of employees serving in competitive positions or in positions under the General Schedule, without change in the employee's civil service or pay status.

8-3. PURPOSE OF DETAILS

a. When permitted. Details are intended only for meeting temporary needs of the agency's work program when necessary services cannot be obtained by other desirable or practicable means. It is recognized that details may be made appropriately under circumstances such as the following:

(1) *Emergency details.* To meet emergencies occasioned by abnormal workload, change in mission or organization, or unanticipated absences.

(2) *Other details.* Pending official assignment, pending description and classification of new position, pending security clearance, and for training purposes (particularly where the training is a part of established promotional or developmental programs).

b. When prohibited. (1) Detailing employees to other kinds of positions or to other examining jurisdictions immediately after competitive appointment tends to com-

promise the competitive principle, and so is not permitted. Except for an emergency detail of 30 days or less, an employee may not be detailed for at least three months after appointment from the register.

(2) Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum period of 120 additional days.

(3) An employee who is serving under an excepted appointment may not be detailed to a position in the competitive service without prior approval of the Commission. (See civil service rule 6.5.)

8-4. AGENCY RESPONSIBILITIES WHEN USING DETAILS

a. Limiting to shortest practicable time. Agencies are responsible for keeping details within the shortest practicable time limits, and for making a continuing effort to secure necessary services through use of appropriate personnel actions.

b. Counseling on proper use. Agencies are further responsible for advising supervisors of the conditions under which details may properly be made.

c. Recording details. (1) Details in excess of 30 days will be reported on Standard Form 52 or other standard form considered appropriate by the agency and maintained as a permanent record in Official Personnel Folders.

(2) This report is *not* required for the detail of a career or career-conditional employee who is being assigned to

perform duties of a position which is either an identical additional position or a position of the same grade, series code, and basic duties as the position he is regularly assigned to. The exception is permitted to eliminate paper work where the same function (such as inspection, or investigation) is performed from a number of different organizational or geographic points, and it becomes necessary to augment the staff of one office with personnel from another office for a temporary period.

d. Controlling details. Agencies are responsible for controlling the duration of details and assuring that the details do not compromise the open-competitive principle of merit system or the principles of job evaluation.

e. Details to higher grade positions. Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. If a detail of more than 60 days is made to a higher grade position, or to a position with known promotion potential, it must be made under competitive promotion procedures. (See section 4-1 of chapter 335.)

f. Obtaining prior approval for extension or propriety of a detail. (1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency must request prior approval of the Commission on Standard Form 59. Prior approval is not required, however, for a detail described under section 8-4c(2).

(2) The request goes to the executive officer of the interagency board of examiners which services the installation to which the detail is made. For installations serviced by the Washington, D.C. Interagency Board, however, the

request goes to the Chief, Career Service Division, Bureau of Recruiting and Examining.

(3) The Commission will not authorize an extension beyond 120 days if appropriate classification action has not been completed. (See section 1-6b of chapter 511.)

(4) The Commission normally will approve an extension for no more than 120 days at a time. If the detail is to a higher grade position, the Commission will approve only one extension of up to 120 days, for a total of 240 days.

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August 26, 1970

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FEDERAL PERSONNEL MANUAL
CHAPTER 312. POSITION MANAGEMENT

4-5. CONDITIONS PREREQUISITE TO FILLING POSITIONS

a. Basic requirements. Before filling a position other than by detail, the appointing officer should assure himself that the position has been properly evaluated or graded, that funds are available for pay, and that the position is not scheduled to be abolished through reorganization or reduction in force.

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February 23, 1973

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FPM Supplement 752-1

ADVERSE ACTIONS BY AGENCIES
Subchapter S1. Action Coverage

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S1-4. REDUCTIONS IN RANK

a. Definition. In law and the Commission's regulations, the term *rank* means something more than a numerical grade, or class, or level under a classification system or its equivalent in the Federal Wage System. Basically, it means an employee's relative standing in the agency's organizational structure, as determined by his official position assignment. An employee's position assignment may be changed only by an official personnel action. Consequently, a reduction in rank can occur only when the employee is moved from one position to another by an official personnel action. (An official personnel action is an action which requires the issuance of a Standard Form 50 or a form used instead of SF 50.) When an employee is made the subject of an official personnel action which results in a lowering of his relative standing in the agency's organizational structure, a reduction in rank has occurred, even though the employee has not been reduced in numerical grade, or class, or level.

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October 11, 1976